Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SAMUEL L. NARO AND LINDA NARO, HUSBAND AND WIFE,

Petitioners,

v.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX AND RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

45 pp

QUESTIONS PRESENTED

Does a person become a limited purpose public figure concerning an uncharged criminal incident where the "public controversy" is created by press defendants' earlier publication about him regarding an unrelated charged offense, he does not invite or encourage media attention, participate in the public arena or attempt to influence the resolution of the public controversy as to either criminal matter, receives no media attention before the charged offense and public attention is involuntarily thrust on him as to both criminal matters?

Was press defendants' motion for summary judgment improperly granted where the evidence in the record could have supported a reasonable jury finding of actual malice and defendants purposefully avoided the truth by publishing that plaintiff was a murder suspect and other information about the investigation purportedly being conducted by the police on him?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Samuel and Linda Naro respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The order of the Supreme Court of New Jersey denying petitioners' petition for certification (App., *infra*, 1a) is unreported. The opinion of the New Jersey Superior Court, Appellate Division (App., *infra*, 2a to 9a) is unreported.

JURISDICTION

The judgement of the New Jersey Superior Court, Appellate Division was entered on September 4, 1996 (App., *infra*, 2a). The Supreme Court of New Jersey denied a timely petition for certification on January 7, 1997 (App., *infra*, 1a). On March 28, 1997 (App., *infra*, 28a), the Hon. David H. Souter extended the time to file the writ of certiorari in this matter from April 7, 1997 to and including June 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a) to review a judgment of the Supreme Court of New Jersey by issuance of a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law *** abridging the freedom of speech ***."

STATEMENT

A. Statement of the Case

Plaintiffs, a husband and wife, sued the press defendants, The Trentonian and the Trenton Times, on October 15, 1991 in the Superior Court of Mercer County, New Jersey. They

alleged that on October 25, 1990, press defendant, The Times, falsely, libelously and maliciously wrote and published in its newspaper an article which stated that plaintiff[1] was a suspect in the September 1989 murder of Marjorie Szeker and that on October 25, 1990, the township police confirmed that plaintiff was a suspect in that case. Plaintiff also alleged that on October 25, 1990, press defendant, The Trentonian, falsely, libelously and maliciously wrote and published in its newspaper an article which stated that the Trenton suspect owned a van at the time of the Szeker murder and that the vehicle was seen fleeing the scene. (App., *infra*, 16a to 19a). Defendants published a total of 7 articles in which they claimed that plaintiff was a murder suspect, 6 of which appeared virtually consecutively, with the last one appearing almost one year later.

These written statements allegedly injured plaintiff's good name, fame, credit and brought him into public disgrace and infamy among his neighbors and community, causing him to suffer humiliation, shame, embarrassment and degradation, as well as mental and emotional distress and other damages. (App., *infra*, 20a). Additionally, plaintiff, Samuel Naro's wife, Linda Naro (also a plaintiff), alleged that she was deprived of consortium and services of her husband. (App., *infra*, 25a to 26a). Compensatory and punitive damages, as well as attorney's fees and cost of suit and interest were sought by both plaintiffs. (App., *infra*, 19a to 20a; 24a; 26a).

Plaintiff has been a firefighter in Trenton, New Jersey since 1970. Before October 23, 1990, he had no criminal record, not even traffic violations. Unfortunately, on October 23, 1990, he was arrested on assault and related charges. Without his consent, these charges were publicized by both

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[1] Unless otherwise specified, "plaintiff" refers to Samuel Naro.

press defendants. Ultimately, on March 12, 1993, he was acquitted of these charges following a non-jury trial.

Since September 1989, the Hamilton Township police were investigating the murder of Marjorie Szeker, an incident that was unrelated to the assault charges that allegedly occurred over one year later and as to which plaintiff was ultimately acquitted. The police had a composite sketch of Szeker's alleged murderer. In an earlier article defendant, The Times, described the composite of the getaway car driver as a thin 20 - 30 year old white or Hispanic male.

Nevertheless, defendant, The Times', October 25, 1990 newspaper article labeled plaintiff a "suspect" in the Szeker murder, allegedly based on his resemblance to a composite sketch that was prepared by the police in September 1989, over one year before plaintiff's arrest on the unrelated assault charges. The front-page article indicated that the police confirmed that plaintiff was a suspect and identified an officer (Pizzullo) as the officer who provided information for the article. The Times', October 25, 1990 article described plaintiff as 48 years old. Plaintiff is white.

However, during depositions, the police captain (Pizzullo) indicated that when he had been asked by defendant's reporter, if plaintiff was a suspect in the murder, he replied that everyone was a suspect, but the police did not have anyone locked up. He was also deposed about being asked by the reporter if plaintiff resembled the composite and stated that during the media interview, he had responded in the affirmative, but had also indicated that he himself also looked like the composite. He had further stated that the composite was very general; there was nothing outstanding about it.

When deposed, the other alleged police source, the head of the Division of Police (Taylor) indicated that defendant's reporter had called him about the murder, possibly "fishing" for

a lead, as was this reporter's *modus operandi*. During depositions, the police head recalled that a defendant reporter advised him of the reporter's "understanding" that the police were looking at plaintiff as a murder suspect. The police head recalled that he did not tell the reporter that plaintiff was a suspect. On the contrary, he advised the reporter that he had no knowledge about the police looking at plaintiff for anything, so he referred the reporter to the captain. The captain then advised the police head that up to that point, the police had not considered plaintiff a suspect. However, because they were getting a lot of calls because of the newspaper articles and the composite, they were going to have to start looking at plaintiff. A few days to a week later, the captain told the police head that he (the captain) did not think that plaintiff committed the murder.

The police head was also questioned during depositions about his earlier certification in which he indicated that he told a Trentonian reporter that the police considered plaintiff a suspect. In the certification, the police head had indicated that for a period of time,[2] the police had considered plaintiff to be a suspect in the murder and that he had so informed a Trentonian reporter. However, during depositions, the police head stated that although he may have had such a conversation with a reporter, he did not remember.

Furthermore, a police lieutenant (Pollard) certified under oath that the police department's investigatory records contained no references whatsoever identifying plaintiff as a suspect in the murder investigation or otherwise referring to plaintiff as to that investigation. He also certified that there were no documents in possession of the police department's records as to the same.

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[2] The specific time period was not set forth in the certification.

On October 25, 1990, defendant, The Trentonian, also ran a front page article labeling plaintiff a suspect in the Szeker murder. That article named the township police as the sources for their story. The article headline stated that plaintiff was to "be quizzed" in the Szeker slaying. A later Trentonian article insinuated that plaintiff owned a van similar to the one seen at the murder scene. In fact, plaintiff was never confronted or questioned by the police. No investigation was conducted by the police regarding plaintiff, except with regard to a van which he allegedly owned. The police could not come up with the vehicle that plaintiff supposedly owned, which was allegedly similar to that seen near the murder.[3]

A subsequent article by defendant, the Trentonian, indicated that a suspect in the murder was a Hispanic man in his twenties, from the Trenton area, who had been arrested in the past and had been involved with drugs. According to this article, the authorities held a suspect, Rivera, prisoner in the county detention center on unrelated charges. The article indicated that the prisoner, a cocaine addict, had confessed to the murder. Significantly, plaintiff was 48 years old at the time of the publications.

The record has no indications that plaintiff was ever in the public eye regarding his employment or for any other purpose prior to his assault arrest. Similarly, the record provides no indications that during or after the publications, he elicited or encouraged any publicity or otherwise participated in or engaged in any public controversy. His depositions indicate that his attorney advised both plaintiffs not to speak to the newspapers about anything and that plaintiff never spoke to any

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[3] As late as September 4, 1991, The Times published another article in which it continued to refer to plaintiff as a murder suspect. By then, the police had ascertained that plaintiff's van did not match the one seen at the murder scene.

reporter about the news articles. Similarly, the record is barren of any indicia that he capitalized on the publicity that appeared after his assault arrest or after he was branded a murder suspect or in any way deployed that publicity in an effort to influence or resolve issues in a public controversy.

The only responses to the publicity on behalf of plaintiff were two articles appearing after he was branded a murder suspect. The articles quote his criminal defense attorney's denial of plaintiff 's murder involvement. Plaintiff is not quoted in the articles. The record reflects no personal remarks by him in response to the publicity about either the assault charge or as to his being labeled a murder suspect. His wife is quoted in one of the articles as essentially declining to comment.

B. Proceedings Below

Defendant, The Times, contended on its motion for summary judgment that plaintiff was a limited purpose public figure to whom the constitutional libel standard[4] of actual malice applied. This claim was based on this defendant's assertion that its statement labeling plaintiff a murder suspect comprised a topic of legitimate public concern. Additionally, defendant claimed that plaintiff's participation in the earlier armed robbery, with the use of weapons and disguises, constituted voluntary participation in a public controversy. Finally, this defendant asserted that since plaintiff's earlier robbery arrest was widely reported before his being implicated in the murder, he became a limited purpose public figure. Both defendants claimed that their publications about plaintiff being a murder suspect were true and, thus, not malicious.

Petitioner, in his opposition to defendant, The Times', motion, contended that he was not a limited purpose public

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[4] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

figure. He maintained that his prior arrest for robbery, of which he was subsequently acquitted, did not create a public controversy or a topic of legitimate public concern. He also asserted that he did not place himself into the controversy regarding the murder investigation by his alleged earlier robbery. He also claimed that he had sufficiently proven actual malice to survive defendants' motion for summary judgment. The trial judge granted defendants' motion for summary judgment, relying, generally on *New York Times v. Sullivan*, *supra* and other authorities cited before him. (App., *infra*, 10a to 11a).[5]

Before the Appellate Division,[6] plaintiff adopted the same position as before the trial court. He also contended that his employment as a firefighter did not place him within the realm of a public figure. Defendant, The Times, made the same assertions as before the trial court. Additionally, he also claimed that plaintiff placed himself in the limelight concerning the murder by committing a criminal act with a *modus operandi* similar to that used in that murder, as well as to the earlier robbery. Thus, The Times claimed that plaintiff could not complain that he involuntarily became a limited purpose public figure. The defendants also reiterated their earlier contentions regarding actual malice.

The New Jersey court, citing *Gertz v. Robert Welch, Inc.*, *supra* and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), ruled that plaintiff was a limited purpose public figure. It based its decision on the following facts: that two days before the publication of the articles, plaintiff, a firefighter, was

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[5] Plaintiff and defendants, Hamilton Township, the Hamilton Township Police Department and Captain Pizzullo settled and these defendants and are not part of this petition. (App., *infra*, 12a).

[6] Hereinafter referred to as "the New Jersey court".

arrested after attempting to flee following the assault and robbery of an elderly man in Trenton, New Jersey. Plaintiff wore a disguise during the assault and owned a van during this time period. Ultimately, he was acquitted of those charges. Defendants, The Times and The Trentonian, two local newspapers, gave the robbery and plaintiff's firefighter employment a significant amount of publicity. The court concluded that plaintiff then became a suspect in a murder involving a different victim. Without any additional analysis, the court ruled that as such, plaintiff became a limited purpose public figure. It also ruled that plaintiff did not present substantial evidence that defendants knew he was not a suspect or entertained serious doubts as to the same, finding that the police were the basis of the stories. (App., *infra*, 6a to 7a).

In his petition for certification to the New Jersey Supreme Court, plaintiff essentially reiterated his position before the trial court and the Appellate Division. Citing *Wolston*, he claimed that he did not become a limited purpose public figure in the murder investigation by his alleged involvement in the earlier unrelated robbery. Defendant, The Times, also reiterated its earlier positions. It also sought to distinguish *Wolston*, claiming that this Court's decision did not control because the alleged criminal conduct in the present case was much more culpable. It also claimed that since *Wolston* was not decided under state law, it did not apply. The parties reiterated their positions regarding actual malice.

REASONS FOR GRANTING THE PETITION

As several Circuit Courts have acknowledged, there has been an ongoing struggle to define the parameters of public controversy and a limited purpose public figure. A noted divergence, which needs to be addressed by this Court, has appeared in several Circuit Courts regarding the parameters of *Gertz, Wolston and Hutchinson v. Proxmire*, 443 U.S. 111

(1979). Several Circuit Courts have gone far astray, and, like the New Jersey court, have created unwarranted exceptions to these cases which directly fly in the face of the rationale of this Court's rulings.

This case presents a timely opportunity to refine the contours of these concepts and provide uniformity to the Circuit Courts' and state courts' interpretations. Moreover, the decision below was clearly erroneous and the issues it addresses are highly significant.

I. The Ruling of the New Jersey Superior Court, Appellate Division, As Upheld by the New Jersey Supreme Court, Conflicts with the Principles of This Court's Prior Rulings, As Well As with Several Circuit Court of Appeals' Interpretations Regarding the Parameters of Public Controversy and Limited Purpose Public Figure

A. This Court's Prior Rulings

In the landmark case of *New York Times Co. v. Sullivan*, *supra*, 280, this Court ruled that the First Amendment precluded defamation recovery by a public figure unless the plaintiff proved the publication of a defamatory falsehood with actual malice, *i.e.*, with knowledge that it was false or with reckless disregard of whether or not it was false. In *Gertz v. Welch, Inc.*, *supra*, this Court specifically declined to apply the *New York Times* standard to private individuals. This Court based its refusal to extend the *New York Times* rule on public figures' ability to resort to effective self-help, thus, making them less vulnerable to injury from defamatory statements. And, more importantly, public figures voluntarily expose themselves to increased risk of injury from defamatory falsehood. *Gertz v. Welch, Inc.*, *supra*, 164, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren,

C.J., concurring). Thus, public persons are deemed less deserving of protection than private ones.

This Court has identified public figures as generally those who "have assumed roles of special prominence in the affairs of society". *Gertz v. Welch, Inc.*, *supra*, 164. Some such individuals occupy positions of such persuasive power and influence that they are considered public figures for all purposes. However, more frequently, public figures have "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz v. Welch, Inc.*, *supra*, 164. In this respect, this Court has focused on the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. In *Gertz*, the plaintiff, an attorney, had not taken part in the criminal prosecution that engendered the publication, had not discussed the litigation with the press and limited his participation in the civil litigation to representing a private client. Under the circumstances, he was not considered a public figure and was not required to prove actual malice on the part of defendants.

In *Wolston v. Reader's Digest Ass'n, Inc.*, *supra*, this Court directly confronted the applicability of the *Gertz* standards to criminal defendants. In *Wolston*, defendant's book referred to plaintiff as an identified KGB agent who had been indicted for espionage and also listed him in the book's index to the KGB. Plaintiff was never indicted for espionage. However, he had failed to respond to a grand jury subpoena regarding an investigation into KGB intelligence activities, as a result of which, an order to show cause was issued. Over the next two days, 7 newspaper articles focused on his failure to appear. Ultimately, plaintiff pleaded guilty to the charge of contempt. Newspaper articles reported the contempt proceedings, his guilty plea and sentence. A total of 15 articles covered these and the preceding events. Plaintiff, who had led a private

existence before the articles, returned to relative obscurity after his sentencing. The book by defendants appeared several years later.

This Court ruled that plaintiff was not a limited purpose public figure.[7] His mere citation for contempt did not turn him into one. His contempt citation and his actions which brought it about were undoubtedly newsworthy and attracted media attention. However, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Readers's Digest Ass'n, Inc., supra*, 168.

Rather, the focus is primarily on the nature of plaintiff's involvement in the public controversy. Plaintiff had not voluntarily thrust or injected himself into the forefront of the public controversy about the investigation of KGB espionage. He was dragged unwillingly into the controversy; the government pursued him in its investigation. His failure to appear before the grand jury and his contempt conviction undoubtedly attracted media attention. However, his voluntary failure to appear before the grand jury, knowing that his action might attract publicity, was not decisive.

Similarly, plaintiff in *Wolston* did not engage the attention of the public in order to influence the outcome of the issues involved and did not assume any special prominence in the resolution of the public question. His crime was not calculated to draw attention to himself, to invite public comment or to influence the public as to any issues. He did not use his

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[7] Since he had not achieved any general fame or notoriety or assumed a role of special prominence in the affairs of society as a result of the contempt citation or because of the espionage investigation, he was not a public figure for all purposes. *Wolston v. Readers's Digest, Assn. Inc., supra*, 164.

contempt citation as a public fulcrum to create public discussion about the investigation or the prosecution. His failure to appear before the grand jury was not intended to affect any issue of public concern, nor did it have that impact.

This Court reiterated its earlier ruling in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), that generally participants in litigation are "drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against the State or by others." *Wolston v. Reader's Digest Ass'n, Inc., supra*, 168. Such persons do not forfeit their rights simply because they are drawn into a courtroom and any other conclusion would create an "open season" for those seeking to defame someone who has been criminally convicted.

On the same day as *Wolston,* in *Hutchinson v. Proxmire, supra*, this Court also delineated what comprises a "public controversy". There, plaintiff, a state mental hospital researcher, was given a Golden Fleece award by a United States Senator to publicize what the Senator perceived as an egregious example of wasteful governmental spending. The award was publicized in a press release, as well as in a speech by the Senator, to which plaintiff responded. Plaintiff's response was reported by some newspapers and wire services.

This Court ruled that plaintiff's earlier published professional writings were only of scholarly interest and did not create controversy until the bestowal of the award. Since their controversial status only resulted from the award, defendant could not point to a controversy he himself created as the source of plaintiff's public figure status. Clearly, defamation defendants cannot, by their own conduct, create their own defense by making the plaintiff a public figure. *Hutchinson v. Proxmire, supra*, 134. Also, as this Court declared in *Wolston*, one who engages in criminal conduct does not automatically

become a public figure on issues as to his conviction. *Wolston v. Reader's Digest Association, Inc.*, *supra*, 168.

B. *The Interpretation of Gertz, Wolston and Hutchinson by the New Jersey Court Ignores the Basic Tenets of These Rulings and is Therefore Erroneous*

The New Jersey court ignored the basic tenets of this Court's rulings in *Gertz, Wolston* and *Hutchinson.* Its erroneous decision needs to be rectified and guidance should be provided to the state and federal courts regarding these cases' highly important jurisprudence.

The New Jersey court based its decision on the following facts: that two days before the publication of the articles, plaintiff, a firefighter, was arrested after attempting to flee following the assault and robbery of an elderly man in Trenton, New Jersey. Plaintiff wore a disguise during the assault and owned a van during this time period. Ultimately, he was acquitted of those charges. Defendants, The Times and The Trentonian, two local newspapers, gave the robbery and plaintiff's firefighter employment a significant amount of publicity. Plaintiff then became a suspect in the murder involving a different alleged victim. Without any additional factual analysis, the New Jersey court concluded that as such, plaintiff became a limited-purpose public figure. (App., *infra*, 7a).[8]

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[8] In addition to addressing the federal constitutional malice standards, the New Jersey court also ruled on the state fair report privilege. (App., *infra*, 8a to 9a). Nevertheless, this Court should address the federal constitutional issues posed herein based on special considerations discussed *infra* regarding the importance of clarifying the parameters of this Court's rulings in *Wolston, Gertz* and *Hutchinson. See, Hutchinson v. Proxmire*, *supra*, 122.

At the outset, it is clear that plaintiff's firefighter employment does not make him a public figure. In *Gertz*, this Court has specifically rejected attorney status as delineating a public figure. *See also Marcone International Magazine for Men*, 754 F. 2d 1072 (3rd Cir. 1985), *cert. den.* 474 U.S. 864 (1985); *Jenoff v. Hearst Corporation*, 644 F. 2d 1004 (4th Cir. 1981). Surely, if an attorney, who, by dint of one's professional situation, with generally greater opportunity for media access and influence, does not comprise a public figure on professional grounds, a firefighter is even far less likely to. Here, plaintiff did not occupy an extraordinary or influential position that would have justified public figure status application on the basis of his profession.

In *Rosenblatt v. Baer*, 383 U.S. 75, 86, n. 13, (1966), this Court also addressed a government employee's status. There, this Court observed that the government position must invite public scrutiny and discussion of the person holding it, totally apart from the scrutiny and discussion occasioned by the particular charges in controversy. Under the circumstances, to the extent that a firefighter's position were deemed public employment, plaintiff could not be viewed as a public figure based on his profession. The Appellate Division clearly erred in relying on that factor in its limited public figure characterization of plaintiff.

The New Jersey court also fell far short of the mark in its analysis of plaintiff's involvement in a public controversy. In its finding that plaintiff was a limited purpose public figure, it relied on earlier publicity by defendant newspapers concerning the robbery. (App., *infra*, 7a). Defendants initially published a total of 3 articles regarding the robbery case. Subsequently, they published a total of 7 articles in which they claimed that plaintiff was a murder suspect, 6 of which appeared almost consecutively, with the last one appearing almost one year later.

In this respect, the New Jersey court clearly erred. It was manifestly improper for the court to rely on the earlier publicity about the robbery as the source of the public controversy in which plaintiff was allegedly involved. The earlier controversy was not one into which plaintiff thrust himself, but one that was also generated by the identical press defendants. As such, defendants cannot take advantage of a controversy which they themselves created and rely on it as the source of plaintiff's public figure status.[9] This Court's ruling in *Hutchinson* clearly proscribes such an approach.

Specifically, the record has no indications that plaintiff was ever in the public eye regarding his employment or for any other purpose prior to his assault arrest. Similarly, the record provides no indications that during or after the publications, he elicited or encouraged any publicity or otherwise participated in or engaged in any public controversy. His depositions indicate that his attorney advised both plaintiffs not to speak to the newspapers about anything and that plaintiff never spoke to any reporter about the news articles. Similarly, the record is barren of any indicia that he capitalized on the publicity that appeared after his assault arrest or after he was branded a murder suspect or in any way deployed that publicity in an effort to influence or resolve issues in a public controversy.

The two responses to defendants' publications by plaintiff's attorney, who defended him in the robbery case, clearly do not vitiate plaintiff's private status. The articles quote his criminal defense attorney's denial of the murder involvement insinuation. Plaintiff is not quoted in the article. The record reflects no indicia that plaintiff ever made any

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[9] At no point was it contended that plaintiff was an involuntary public figure. As described by this Court, that situation is extremely rare (*see, Gertz, supra*, 345; *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541,1552 (4th Cir. 1994), and, in any event, was inapplicable here.

personal remarks in response to the publicity about either the assault charge or as to his being labeled a murder suspect or that he ever personally addressed or responded to defendants' publications. His wife is merely quoted in the article as essentially declining to comment.

Merely responding to a defamatory statement does not bestow public figure status. *Hutchinson v. Proxmire*, *supra*, 111; *Clyburn v. News World Communications, Inc.*, 903 F. 2d 29, 32 (D.C. Cir. 1990); *Foretich v. Capital Cities/ABC, Inc.*, *supra*. As noted by this Court in *Hutchinson*, where plaintiff merely responds to the allegedly defamatory publication, such response does not comprise access to the media of the type available to public figures. Rather, public figures, as an accouterment of their pre-existing status, are expected to have regular and continuing access to the media. *Hutchinson v. Proxmire*, *supra*, 134.

The New Jersey court's interpretation represents an unwarranted extension of this Court's rulings. Essentially, the court declared that someone who is once accused of criminality (although he is ultimately acquitted) is fair game for unwarranted insinuations about involvement in another unrelated criminal incident for which he is never charged merely because of publicity about the first alleged offense. In the New Jersey court's view, such a person is fairly subjected to media attention although he was never in the public eye before the initial criminal charge. Furthermore, he is susceptible to media attention even though he takes no steps whatsoever to draw attention to himself in order to invite public comment or to influence public opinion by generating publicity. The sole qualifying factor for his limited public figure status is his unsolicited prior media exposure about an unrelated offense. That, in the New Jersey court's view, suffices to thrust him into the public vortex for future media attention, despite the absence of any effort to invite or encourage such attention

about either the initial charge or the unrelated murder or to capitalize on the publicity in order to influence the outcome of the public controversy. Clearly, such an approach has no basis in this Court's prior rulings.

Left unreviewed, the New Jersey court's ruling would permit the media to avoid defamation responsibility by capitalizing on the happenstance of earlier publicity about an unrelated criminal incident. As such, the media could simply publicize alleged criminality by someone, and, based on the earlier publicity, immunize itself from malice liability merely because of the initial allegation. Pursuant to such an approach, the *Wolston* criteria of voluntary entry into the public sphere by, at the minimum, some form of elicitation or encouragement of public attention, would be perverted. Its key distinction, the defamation plaintiff's passive versus active behavior with respect to the public controversy, would be obliterated. In its stead, a new type of press created controversy would be employed, broader in scope than the one rejected by *Wolston* and *Hutchinson*, by permitting the press to generate both the initial controversy, as well as the one that forms the basis of the defamation suit.

Clearly, *Wolston* does not sanction an "open season" on those against whom criminality is unjustifiably insinuated simply because they have been previously charged with an unrelated offense, especially when the first alleged offense is never substantiated and the second insinuated one is never even charged.[10] Stated somewhat differently, the *Wolston* criteria cannot be evaded simply because two acts of criminality are

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[10] Plaintiff, a 48 year old white man, was never charged with the murder. According to articles by press defendants which appeared after those labeling plaintiff a murder suspect, someone else, a 25 year old Hispanic, who was ultimately detained on other charges, acknowledged having committed the murder.

bandied about by the press, instead of just one, where the defamation plaintiff remains passive and takes no steps to attract or capitalize on the public attention. Just because a defamation plaintiff was once involuntarily drawn into a courtroom does not authorize the press to state that plaintiff may be criminally involved a second time in an unrelated matter. Requiring plaintiff to meet the stringent *New York Times* standards would thus encourage such unwarranted attribution of horrendous criminality at the expense of reputational integrity.

C. *The New Jersey Court's Interpretation of This Court's Prior Rulings in Gertz, Wolston and Hutchinson Aggravates the Existing Divergent Interpretations of These Cases by the Circuit Courts of Appeals*

The federal courts have directly acknowledged difficulty in delineating the scope of the public figure doctrine. This is reflected by the divergent interpretations of the Third, Fourth, Sixth and D.C. Circuit Courts of Appeals. For instance, several Circuit Courts of Appeals have noted the existence of confusion over the elements of a "public controversy" and the contours of the public and private figure categories. *See, e.g., Marcone v. Penthouse International Magazine for Men, supra*; *Street v. National Broadcasting Co.*, 645 F. 2d 1227, 1234 (6th Cir. 1981). Unfortunately, in struggling to define the parameters of *Wolston and Hutchinson*, several Circuit Courts have created new exceptions to this Court's criteria which totally pervert these cases' rulings.

Several Circuit Courts have grappled with delineating the nature of the public controversy as to publicity preceding the cause of action. Noteworthy in this area is *Waldbaum v. Fairchild Publications, Inc.*, 627 F. 2d 1287 (D.C. Cir. 1980),

cert. den. 101 S. Ct. 266 (1980). There, the District of Columbia Circuit looked to what was already in dispute at the time of the publication in issue. In this respect, it posited the following test: "[t]o determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice." *Waldbaum v. Fairchild Publications, Inc., supra*, 1297. In this respect, the court should ascertain whether there was coverage of the debate, "what people were saying and uncovering facts and theories to help the public formulate some judgment." *Id.* The court should ascertain whether "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id.* According to *Waldbaum*, "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy." *Id. See also Tavoulareas v. Piro*, 817 F. 2d 762 (D.C. Cir. 1987), *cert. den.* 484 U.S. 870 (1987). Significantly, some Fourth Circuit cases have chosen to follow *Waldbaum*. *See, e.g., Foretich v. Capital Cities/ABC, Inc., supra*; *Reuber v. Food Chemical News, Inc.*, 925 F. 2d 703 (4th Cir. 1991), *cert. den.* 501 U.S. 1212 (1991).

While the *Waldbaum* criteria are helpful by focusing on the existence of a public controversy before the publication, they do not directly take into account the existence of earlier publicity regarding the defamation plaintiff that is purely press created by the very same press defendants about an unrelated matter. In other words, they do not address a preceding press generated controversy that comprises the sole source of media attention and is created by the identical publishers. *Cf., Foretich v. Capital Cities/ABC, Inc., supra*; *Silvester v. American Broadcasting Companies, Inc.*, 839 F. 2d 1491 (11th Cir. 1988) (distinguishing earlier pervasive publicity generated

by other forms of media from that which occasioned the defamation suit). Obviously, without explicit consideration of earlier press generated publicity by the same media sources, *Wolston* and *Hutchinson* can be easily circumvented. Press defendants would simply have to issue a single article about an unrelated activity by plaintiff and thus avoid the press created controversy designation.

Another Circuit has taken prior publicity by the same publisher into account. In *Jenoff v. The Hearst Corporation, supra*, the Fourth Circuit correctly analyzed the plaintiff's alleged criminal misconduct vis-a-vis his role in the public controversy. In that case, defendant initially published an article about the plaintiff's (a police informant) activities. The first article indicated that posing as an investigator, plaintiff had infiltrated the office of an attorney who represented a notorious criminal defendant.[11] A subsequent allegedly defamatory article stated that plaintiff had broken into the attorney's office and that key written statements regarding the notorious criminal's case had disappeared at that time. The court observed that plaintiff enjoyed no special access to the media, other than that which the media itself created by the defamatory publication. Significantly, the court recognized that if a public controversy existed before the defamatory articles, plaintiff did not voluntarily participate in it. The court also recognized that the same article series that initially focused on plaintiff simultaneously generated the specific public controversy. Although the subject of the articles was of general public concern, it ruled that such general concern was rejected by *Hutchinson* as a public controversy. *Jenoff v. The Hearst Corporation, supra*, 1007.

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[11] That article was not alleged to be defamatory.

Like the New Jersey court, the Third Circuit has also misconstrued *Wolston*'s distinction between active and passive defamation plaintiffs. In *Marcone v. Penthouse International Magazine for Men, supra*, the Third Circuit concluded that "active" criminal misconduct by the plaintiff comprises one of the factors leading to public figure status classification. In that case, the plaintiff, an attorney, had been indicted for conspiracy to possess with intent to distribute and to distribute marijuana. Due to legal technicalities, the indictment was withdrawn without prejudice to his being reindicted, but, inexplicably, he was not reindicted. Defendant's article, which appeared several years later, claimed that plaintiff contributed a large down payment for marijuana transactions and that charges against him were dismissed due to his cooperation with the State. The Third Circuit opined that plaintiff's criminal activity comprised a relevant consideration in assessing his public figure status.[12] It distinguished *Wolston*, based on the "passive" nature of the crime involved from the "active" criminality engaged in by plaintiff Marcone. As to these factors, the Third Circuit relied on *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd* 580 F. 2d 859 (5th Cir. 1978), which preceded *Wolston*. Thus, the validity of *Marcone* was significantly undercut.

In *Marcone*, the Third Circuit's active/passive criminality distinction created an artificial and unwarranted exception to the *Wolston* doctrine. Significantly, in a later ruling by different judges, in *Schiavone Construction Co.*, 847 F. 2d 1069 (3rd Cir. 1988), the Third Circuit no longer employed this

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[12] In finding plaintiff a limited purpose public figure, the Third Circuit also relied on plaintiff's voluntary non-representational contacts and meetings with a notorious motorcycle gang, which was linked to a major drug ring. *Marcone v. Penthouse International Magazine for Men, supra* 1085.

distinction. Thus, there appears to a divergence within that Circuit itself as to this area. *See Steaks Unlimited, Inc. v. Deaner*, 623 F. 2d 264 (3rd Cir. 1980).

The active versus passive criminal misconduct exception created by the Third Circuit has no foundation in this Court's ruling in *Wolston*, which recognized that criminal defendants are not transformed into public figures by their conviction. Pursuant to *Wolston*, public figure status requires, *inter alia*, voluntary participation in a public controversy, coupled with an intention to influence to resolution of the public issue. Active versus passive criminal misconduct is irrelevant to those considerations. Passivity is relevant only insofar as a plaintiff voluntarily participates in the public brouhaha and tries to influence its outcome, but is clearly not germane to the litigant's role in the crime that engenders the media interest. Otherwise, a litigant would be penalized for merely being the object of a press-created controversy.

An equally unfounded distinction has been coined by the Sixth Circuit, which has also markedly departed from this Court's promulgated standards. That Circuit has created a new and unwarranted exception to the *Wolston* criteria as to what comprises voluntary participation in the public arena by a defamation plaintiff who is involved in a criminal case. Specifically, in *Street v. National Broadcasting Co.*, *supra*, 1234-35, the Sixth Circuit ruled that where the issue of truth and the voluntariness of the plaintiff's participation in the public controversy were the same, the plaintiff's public figure status was to be determined without regard to whether that litigant voluntarily thrust itself in the forefront of the public controversy. The court acknowledged that there, the rape victim did not voluntarily inject herself into a criminal prosecution. However, voluntariness was closely bound to the truth. If the victim's rape accusation were true, her participation in the legal process was deemed involuntary; if

her accusation were false, it was considered voluntary. Absent evidence of voluntariness other than that turning on the issue of truth, voluntariness would not be considered and public figure status would be ascertained only by consideration of prominence and access to the media. *Cf. Clark v. American Broadcasting Companies, Inc.*, 684 F. 2d 1208 (6th Cir. 1982).

The Sixth Circuit's refusal to consider voluntariness, in the case of a rape victim, where voluntariness was intertwined with the truth, was also an unwarranted divergence from *Wolston*. Nowhere in *Wolston* does such an exception appear; nor does it fall within *Wolston*'s rationale. Rather, *Wolston* and *Time* require that limited public figure status determination rest on, *inter alia*, the voluntariness of the plaintiff's entry into the public arena, regardless of the perceived truth or falsity of the plaintiff's position as to the event that triggered the controversy. As this Court ruled in *Time*, involvement in the judicial process does not signify one's voluntary injection into the public limelight. Thus, the truth or falsity of the plaintiff's claims as an alleged crime victim has no bearing on his/her voluntary participation in the public sphere. *Cf. Clark v. American Broadcasting Companies, Inc.*, 684 F. 2d 1208 (6th Cir. 1982).

These cases reflect the creation of unwarranted exceptions to *Gertz, Hutchinson and Wolston* which fall entirely outside their rationales. They illustrate the lack of uniformity in the Circuits and the confusion experienced by the New Jersey court. This Court should grant the plaintiff's petition to resolve the confusion and disarray in the courts and give much needed guidance regarding this vital area.

II. The New Jersey Court's Ruling Conflicts with This Court's Decision Regarding Purposeful Avoidance of the Truth

The New Jersey court's decision also conflicts with this Court's ruling in *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 654 (1989), in which this Court relied on the purposeful avoidance of the truth doctrine. The case involved the following factual scenario: defendant newspaper published an article indicating that plaintiff, an unsuccessful judicial electoral candidate, had used "dirty tricks" and made bribe-type offers to a grand jury witness and to her sister for their help in a grand jury investigation of the incumbent judicial candidate's director of court services. The article quoted the grand jury witness as the source of its information. However, defendant had failed to contact the grand jury witness' sister, even though she was the most important witness to the bribery charges. Defendant also failed to listen to the tapes of the interviews between plaintiff and the grand juror's sister, although the tapes could have demonstrated that the witness' charges were false because she misinterpreted plaintiff's remarks to her or because the witness was deliberately lying.

This Court found it "bewildering" that defendant failed to interview the grand jury witness' sister, since the sister was the one person who could have confirmed the witness' account. If the newspaper had serious doubts about the truth of the witness' allegations, but was committed to running the story, it had good reason to forego such an interview since a denial by the witness' sister would have quickly ended the planned story. The newspaper's failure to listen to the tapes of plaintiff's interviews of the witness' sister also supported a finding of actual malice. Much of the witness' allegations could have been verified or disproved by simply listening to the tapes.

This Court reiterated that failure to investigate before publishing did not suffice to establish reckless disregard of the truth, even though a reasonably prudent person would have investigated. Nevertheless, recklessness could be found "where there were obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks v. Communications, Inc.*, *supra*, 687. The newspaper's derelictions set forth above comprised a deliberate decision not to acquire facts that could have confirmed the falsity of the source's charges. The Court distinguished the mere failure to investigate, which alone would not support an actual malice finding, from the purposeful avoidance of the truth. Under the circumstances of that case, it concluded that purposeful avoidance of the truth, comprising actual malice, had transpired.

Unfortunately, the New Jersey court failed to take cognizance of the *Harte-Hanks* principles. It ruled that the basis of defendant's stories was primarily police sources and that thus, plaintiff failed to present substantial evidence of defendant's knowledge that plaintiff was not a suspect or entertained serious doubts about the same. It utterly failed to address defendants' purposeful truth avoidance tactics, much resembling those in *Harte-Hanks*.

Specifically, the record reflects that on September 26, September 28 and October 7, 1989, articles by defendants, The Trentonian and the Times, described a composite sketch of the alleged murderer. They stated that the getaway car driver was a thin 20 - 30 year old white or Hispanic male.

Armed with that knowledge, which was set forth in their own articles, defendants, nevertheless, subsequently printed a series of 7 articles in which they branded plaintiff, a 48 year old white man, as the murder suspect. In the 7 articles, beginning on October 25, 1990 and concluding almost one year later, they

described him as the murder suspect. Defendants' pervasive publicity thus branded plaintiff, based on his purported resemblance to a composite sketch that was prepared by the police over one year before his arrest on the unrelated assault charges. The article by defendant Trentonian also stated that the police confirmed that plaintiff was a suspect and identified an officer (Pizzullo) as the officer who provided some information for the article. Thereafter, follow-up articles were also run by both defendants.

The October 25 article also stated that plaintiff was to "be quizzed" in the slaying. A later Trentonian article insinuated that plaintiff owned a van similar to the one seen at the murder scene. In fact, plaintiff was never confronted or questioned by the police. No investigation was conducted by the police regarding plaintiff, except with regard to a van which he allegedly owned. The police could not come up with the vehicle that plaintiff supposedly owned, which was allegedly similar to that seen near the murder.

A subsequent article by defendant, the Trentonian, indicated that a suspect in the murder was a Hispanic man in his twenties, from the Trenton area, who had been arrested in the past and had been involved with drugs. According to this article, the authorities held a suspect, Rivera, prisoner in the county detention center on unrelated charges. The article indicated that the prisoner, a cocaine addict, had confessed to the murder. Significantly, plaintiff was 48 years old at the time of the publications.

As late as September 4, 1991, The Times published another article in which it continued to refer to plaintiff as a murder suspect. However, by then, the police had ascertained that plaintiff's van did not match the one seen at the scene and had determined that plaintiff was not a murder suspect.

Moreover, during depositions, the police captain (Pizzullo) indicated that when he had been asked by defendant's reporter, if plaintiff was a suspect in the murder, he replied that everyone was a suspect, but the police did not have anyone locked up. He was also deposed about being asked by the reporter if plaintiff resembled the composite and stated that he had responded in the affirmative, but also indicated that he himself also looked like the composite. He further stated that the composite was very general; there was nothing outstanding about it. In short, he did not corroborate in depositions the Times' claim that the police had confirmed to that newspaper that plaintiff was a murder suspect.

When deposed, the other alleged police source, the head of the Division of Police (Taylor) indicated that a defendant reporter had called him about the murder, possibly "fishing" for a lead, as was this reporter's *modus operandi*. During depositions, the police head recalled that defendant's reporter advised him of the reporter's "understanding" that the police were looking at plaintiff as a murder suspect. The police head recalled that he did not tell the reporter that plaintiff was a suspect. On the contrary, he advised the reporter that he had no knowledge about the police looking at plaintiff for anything, so he referred the reporter to the captain. The captain then advised the police head that up to that point, the police had not considered plaintiff a suspect. However, because they were getting a lot of calls due to the newspaper articles and the composite, they were going to have to start looking at plaintiff. A few days to a week later, the captain told the police head that he (the captain) did not think that plaintiff committed the murder. He also failed to corroborate the media claim of police confirmation as to plaintiff's purported murder suspect status.

The police head was also questioned during depositions about his earlier certification in which he indicated that he told a Trentonian reporter that the police considered plaintiff a

suspect. In the certification, the police head had indicated that for a period of time,[13] the police had considered plaintiff to be a suspect in the murder and that he had so informed a Trentonian reporter. However, during depositions, the police head stated that although he may have had such a conversation with a reporter, he did not remember.

Furthermore, a police lieutenant (Pollard) certified under oath that the police department's investigatory records contained no references whatsoever identifying plaintiff as a suspect in the murder investigation or otherwise referring to plaintiff as to that investigation. He also certified that there were no documents in possession of the police department's records as to the same.

Thus, clearly, defendants had obvious reasons to doubt their claim that plaintiff was a murder suspect. At the time of the initial articles, the media itself manufactured the police as the source of their information. The media's claim of the 48 year old white plaintiff's resemblance to a composite sketch was disproven by their own articles both before and after those branding him a murder suspect, as these articles alleged a 20 - 30 year old Hispanic or white suspect. Thus, based on the information available in their own files, they had obvious reason to doubt the veracity of their claim that plaintiff resembled the composite sketch of the alleged murderer. Rather, they exhibited a manifest intention to avoid the truth.

The same conclusion obtains regarding the additional claims about plaintiff's purported murder suspect status. For instance, the media contended that plaintiff was to be questioned by the police about the murder. A Trentonian article also insinuated that plaintiff owned a van similar to the one seen at the murder scene. In fact, plaintiff was never

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[13] The specific time period was not set forth in the certification.

confronted or questioned by the police. No investigation was ever conducted by the police regarding plaintiff, except with regard to a van which he allegedly owned. The police could not come up with the vehicle that plaintiff supposedly owned, which was allegedly similar to that seen near the murder. A few days to a week after defendants contacted the police, the police determined that plaintiff did not commit the murder.

Nevertheless, apparently, defendants failed to reinterview the very police sources that could have resolved plaintiff's innocence. In fact, almost one year after the initial articles, The Times continued to refer to plaintiff as a murder suspect, long after the police has stopped viewing him as such. Significantly, about 6 months earlier, the media had reported that a young Hispanic suspect had allegedly confessed to the crime.

Under the circumstances, defendants' conduct manifested a deliberate effort to refrain from learning the truth. As in *Harte-Hanks*, here, too, the onus was on defendants to not "play ostrich" in an attempt to insulate themselves from malice liability. As in *Harte-Hanks*, their behavior was premised on a desire to run the story, without being confronted with the truth, at the expense of plaintiff's reputation. This Court should not countenance such an effort to deviate from its ruling.

III. The Questions Presented Are Important

This case presents for resolution the parameters of this Court's prior rulings as to what comprises a public controversy and who is a limited purpose public figure. The case also presents an opportunity to clarify the contours of the purposeful avoidance of the truth doctrine. These are essential determinations in any analysis of defamatory liability.

The cases discussed earlier demonstrate the difficulty which the Circuit Courts have encountered in defining the scope of this Court's prior rulings. One pre-*Wolston* District Court likened the task of distinguishing between public and private figures to "trying to nail a jelly fish to the wall". *Rosanova v. Playboy Enterprises, Inc.*, *supra*.

The unfounded exceptions to this Court's rulings that have been coined by the Third and Sixth Circuits demonstrate the confusion that has arisen in the Circuits and reflect the need for this Court's intervention. Both the active/passive criminality distinction and the distinction as to the truth/falsity of the plaintiff's reason for filing criminal charges are totally irrelevant considerations as to whether the plaintiff actively participated in the public controversy and sought to thereby influence public opinion.

This Court should address the divergence that is apparently emerging in the Circuit Courts in this area and refine the contours of its earlier rulings. This Court should clarify that prior publicity by the same press defendants about the same defamation plaintiff as to an unrelated claimed criminal involvement, without more, cannot serve as the basis for a public controversy and the ensuing bestowal of limited public figure status.

Clarification is also needed as to the contours of the purposeful avoidance of the truth doctrine. This Court's guidance is also needed to further define this important area.

Thus, this Court should grant the plaintiff's petition to resolve the divergence by several Circuit Courts and the New Jersey court from this Court's prior rulings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 6, 1997

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY
C-439 September Term 1996
43,037

SAMUEL NARO, et al.,
Plaintiffs-Petitioners,

v.

HAMILTON TOWNSHIP, et al.,
Defendants,

and

THE TRENTON TIMES & THE TRENTONIAN,
Defendants-Respondents.

ON PETITION FOR CERTIFICATION

[stamp—Filed, Jan 07 1997, /s/ Stephen W. Townsend, Clerk]

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6485-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of January, 1997.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

[stamp—I hereby certify that the foregoing is a true copy of the original on file in my office. /s/ Stephen W. Townsend, CLERK OF THE SUPREME COURT OF NEW JERSEY]

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6485-94T2

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs-Appellants,

v.

HAMILTON TOWNSHIP, HAMILTON POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX AND JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX AND RON ROE X,

Defendants-Respondents.

[FILING DATE, APPELLATE DIVISION, SEP 4 1996,
/s/ R. Emille Cox, Clerk]

Submitted April 3, 1996 - Decided SEP 04 1996

Before Judges Long, Muir, Jr. and Loftus.

On appeal from Superior Court of New Jersey, Law Division, Mercer County.

Robert A. Ballard, Jr., attorney for appellants.

Hughes & Hendrix, attorneys for respondents The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, III (Renee Pozzuoli Buecker, on the brief).

Robinson, St. John & Wayne, attorneys for respondents The Times, Peter Page and Richard Bilotti (Steven L. Lapidus, on the brief).

PER CURIAM

Samuel and Linda Naro, plaintiffs, appeal from summary judgment dismissing their complaint against *The Times (Times)*, Peter Page, Richard Bilotti, *The Trentonian (Trentonian)*, Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, defendants. The Naros also appeal from an order quashing the subpoena served upon defendant, Paul Mickle.

On appeal, the Naros contend:

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS, *THE TIMES*, PETER PAGE, RICHARD BILOTTI, *THE TRENTONIAN*, JOURNAL REGISTER COMPANY, MARK A. WILIGORE, PAUL MICKLE, AND H.L. SCHWARTZ, III ON OCTOBER 6, 1994 WHEN MATERIAL ISSUES OF FACT EXISTED TO BE DETERMINED BY THE FACT FINDER.

POINT II

THE TRIAL COURT ERRED IN QUASHING THE SUBPOENA SERVED UPON THE DEFENDANT, PAUL MICKLE.

We have reviewed the record and conclude that these contentions are without merit. We affirm.

On October 15, 1991, the Naros filed a complaint alleging that the defendants made defamatory statements about Samuel Naro (Naro) in connection with the murder of a school teacher. The relevant facts are as follows.

Two days prior to the publication of alleged defamatory articles, Naro, a Trenton firefighter, was charged with assault and robbery of Andrew Horchak (Horchak), a seventy-eight year old man, on October 23, 1990. After a bench trial on March 12, 1993, he was found not guilty by reason of temporary insanity.

On October 25, 1990, the *Times* published an article which stated that Naro was a suspect in the September 20, 1989 murder and attempted robbery of Marjorie Szeker, a teacher at the Hun School in Princeton. The front page article read: "Firefighter under fire" with a subtitle "Cops: Alleged robber is murder suspect." The composite sketches printed in the October 25, 1990 *Times* article showed the murder suspect as a somewhat disheveled individual with a stubble of beard growth. There was also a composite sketch of an accomplice. The article quoted a township police detective as stating "[w]e are looking at everybody, and as soon as they said [Naro] used disguises, that [Naro] generally fits the composite and generally fits the height requirement, we got interested."

On October 25, 1990, the *Trentonian* published an article which indicated that Naro, 48, bore a facial resemblance to a composite sketch of one of two suspects in the Szeker murder. The *Trentonian* article indicated that the duffle bag seized from Naro at the alleged robbery of Horchak contained a wig and other disguises which might link him to the Szeker slaying. The headline of that article was: "Fireman

to be quizzed in teacher slay. Clues prompt police to quiz fireman in teacher's killing."

On October 26, 1990, the *Trentonian* published another article with the following headline: "Van link probe between fireman, teacher slaying." The article stated that Naro, "owned a heavy duty step-side van," and the "police believe the van involved in the Szeker murder was a small sized van." The article indicated that "others" said that since it was raining heavily when Szeker was knifed and only a fleeting glimpse of the van was seen, a larger van might have been involved. Follow-up articles appeared in the *Trentonian* on October 26, 27 and 29, 1990 and in the *Times* on October 26, 1990.

Summary judgment will only be granted when there are no genuine issues of material fact. *See Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 536 (1995); *R.* 4:46-2. Expeditious disposition of claims based upon alleged libelous publications is appropriate whenever possible. *See Maressa v. New Jersey Monthly*, 89 *N.J.* 176, 196, *cert. denied*, 459 *U.S.* 907, 103 *S.Ct.* 211, 74 *L.Ed.*2d 169 (1982). Summary judgment has been recognized as an important tool for disposing of non-meritorious libel lawsuits. *See Costello v. Ocean County Observer*, 136 *N.J.* 594, 605 (1994). When the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. *See Brill v. Guardian Life Ins. Co. of Am., supra*, 142 *N.J.* at 536. The court must base its consideration of the evidence in the light most favorable to the parties who opposed the summary judgment. *Id.* at 523.

The law of defamation imposes liability for the publication of false matters injuring the reputation of others. *See Maressa v. New Jersey Monthly, supra*, 89 *N.J.* at 190. Libel plaintiffs who have the constitutional status of "public officials" or "public figures" cannot recover unless they

establish by clear and convincing proof that the defendants published false and defamatory statements about them with "actual malice." *See New York Times v. Sullivan,* 376 *U.S.* 254, 84 *S.Ct.* 710, 11 *L.Ed.*2d 686 (1964), *see also Philadelphia Newspapers, Inc. v. Hepps,* 475 *U.S.* 767, 775, 106 *S.Ct.* 1558, 1563, 89 *L.Ed.*2d 783, 791-92 (1986). In *Gertz v. Robert Welch, Inc.,* 418 *U.S.* 323, 94 *S.Ct.* 2997, 41 *L.Ed.*2d 789 (1974), the Supreme Court identified two categories of public figures to whom the constitutional libel standard of actual malice pertain: (1) the "all-purpose" public figures and (2) the "limited-purpose" public figures. *Id.,* 418 *U.S.* at 351, 94 *S.Ct.* at 3013, 41 *L.Ed.*2d at 812. The latter individual becomes a public figure commonly because he "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Ibid.*

In *Wolston v. Reader's Digest Ass'n, Inc.,* 443 *U.S.* 157, 99 *S.Ct.* 2701, 61 *L.Ed.*2d 450 (1979), the Court held that a person who engages in criminal conduct does not automatically become a "public figure." *Id.,* 443 *U.S.* at 168-69, 94 *S.Ct.* at 2707-09, 61 *L.Ed.*2d at 460-61. Thus, public figure status of a criminal defendant, who is the subject of the alleged defamation in a libel case is to be determined no differently than in any other libel case; namely, by focusing on the "nature and extent of an individual's participation in the controversy giving rise to the [alleged] defamation." *Ibid.*

Two days prior to the publication of the articles in the *Times* and the *Trentonian,* Naro was arrested after attempting to flee on foot following the assault and robbery of an elderly man in Trenton. He wore a disguise during the assault. Naro also owned a van during this time period. The two Trenton local newspapers, *Times* and *Trentonian,* gave the Horchak robbery and the fact that Naro was a firefighter a significant amount of publicity. It was a *Trentonian* cover

story on October 24, 1990, "Fireman flips out; maces, mugs elderly neighbor;" and "Three witnesses tackle fireman after holdup try." The *Times* published an article on October 24, 1990, entitled " 'Very sad case' Cops: City firefighter robbed man, 78." Naro then become a suspect in the Szeker murder, and as such became a limited-purpose public figure.

The plaintiffs have a burden under the First Amendment of proving that any defamatory statements published about Naro in the *Times* or the *Trentonian* were false and published with actual malice. *See Philadelphia Newspapers, Inc. v. Hepps, supra,* 475 *U.S.* at 775-76, 106 *S.Ct.* at 1563-64, 89 *L.Ed.*2d at 791-92; *Romaine v. Kallinger,* 109 *N.J.* 282, 289-91 (1988).

"In assessing the [allegedly defamatory] language, the court must view the publication as a whole and consider particularly the context in which the statement appears." *Romaine v. Kallinger, supra,* 109 *N.J.* at 290. The New Jersey Supreme Court has ruled that only subjective evidence will satisfy plaintiffs' actual malice burden:

> The actual-malice standard is subjective. [citation omitted] Accordingly, the inquiry concerns [the defendant's] state of mind. To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that the defendant had a subjective awareness of the story's probable falsity.
>
> [*Costello v. Ocean County Observer, supra,* 136 *N.J.* at 615; *accord Lawrence v. Bauer Pub. & Printing Ltd.,* 89 *N.J.* 451, 467-68, *cert. denied,* 459 *U.S.* 999, 103 *S.Ct.* 358, 74 *L.Ed.*2d 395 (1982).]

In this case plaintiffs failed to present substantial evidence that the newspaper defendants knew Naro was not a suspect

or entertained serious doubts about whether he was a suspect in the Szeker murder. The basis of their stories arose primarily from commentary by police officers, some of whom were specifically identified, and factual circumstances surrounding the Horchak robbery. Thus, the Naros failed to establish facts to sustain their burden that the statements were false and made with actual malice.

The *Restatement (Second) of Torts* summarizes the fair report privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.
>
> [*Restatement (Second) of Torts* § 611, at 297 (1977).]

In this case, we conclude that the journalist reports in the *Times* and the *Trentonian* were protected by the fair report privilege. *See Costello v. Ocean County Observer, supra,* 136 *N.J.* at 607.

Therefore, we affirm the order of the trial court granting summary judgment. *Brill v. Guardian Life Ins. Co. of Am., supra,* 142 *N.J.* 520.

We find no merit to appellant's second contention. *R.* 2:11-3(e)(1)(A), (E).

Affirmed.

[stamp—I hereby certify that the foregoing is a true copy of the original on file in my office. /s/ R. Emille Cox, Clerk]

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO. L-91-4718

ROBINSON, ST. JOHN & WAYNE
Two Penn Plaza East
Newark, New Jersey 07105
(201) 491-3300
Attorneys for Defendants
The Times, Peter Page
and Richard Bilotti

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs,

vs.

HAMILTON TOWNSHIP, et al.

Defendants,

ORDER

[stamp—FILED, OCT 6 1994, JUDGE PHILLIP LEWIS PALEY]

This matter, having come before the Court on the motion of defendants *The Times,* Peter Page and Richard Bilotti for summary judgment; and the Court having reviewed the papers submitted by, and having heard oral argument of, counsel; and for good cause shown;

IT IS on this 6th day of October, 1994;

ORDERED that the motion of defendants *The Times,* Peter Page and Richard Bilotti for summary judgment dismissing all claims against them in this action be and hereby is granted.

/s/ Phillip Lewis Paley
PHILLIP LEWIS PALEY, J.S.C.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

HUGHES & HENDRIX
850 Bear Tavern Road
Suite 304
Trenton, New Jersey 08628
(609) 883-0040
Attorneys for Defendants
The Trentonian, Journal Register Company
Mark A. Waligore, Paul Mickle and H.L. Schwartz, III

CIVIL ACTION
DOCKET NO: L-91-4718

SAMUEL NARO and LINDA NARO,
husband and wife

Plaintiffs,

vs.

HAMILTON TOWNSHIP, et al.

Defendants.

ORDER

[stamp—FILED, OCT 6 1994, JUDGE PHILLIP LEWIS PALEY]

THIS MATTER being brought before the Court by HUGHES & HENDRIX, attorneys for defendants, *The Trentonian,* Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, III, for an Order granting Summary Judgment and the Court having reviewed the moving papers and for good cause shown;

IT IS on this 6th of October, 1994;

ORDERED that Summary Judgment in favor of defendants *The Trentonian,* Journal Register Company, Mark A.

Waligore, Paul Mickle and and H.L. Schwartz III, be and is hereby granted and the Complaint against defendants be dismissed with prejudice.

/s/ Phillip Lewis Paley
PHILLIP LEWIS PALEY, J.S.C.

1068

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO. L-91-4718

ROBERT A. BALLARD, JR., ESQUIRE
Liberty Court - Suite 1200
260 Highway 202/31
Flemington, New Jersey 08822
(908) 806-3171
ATTORNEYS FOR PLAINTIFF

Civil Action

SAMUEL NARO and LINDA NARO,
Plaintiff,

vs.

HAMILTON TOWNSHIP, et al.
Defendants.

STIPULATION OF DISMISSAL (WITH PREJUDICE)

The matter in difference in the above entitled action having been amicably adjusted by and between Plaintiffs and the Defendants, Hamilton Township, Hamilton Township Police Department and Captain Pizzullo, only, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs and with prejudice against either party.

By /s/ Vincent J. Cirlin
VINCENT J. CIRLIN
Attorneys for Defendant

By /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorneys for Plaintiff

Dated: July 25, 1995

APPENDIX F

NOTICE OF APPEAL

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

Attorney of Record:

ROBERT A. BALLARD,
Liberty Court - Suite 1200
260 Highway 202/31
Flemington, NJ 08822
(908) 806-3171
Attorney for Plaintiffs:
Samuel Naro and Linda Naro

Title of Action as Captioned Below

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPT., DET. CAPTAIN THOMAS PIZZULLO, THE TRENTON TIMES, THE NEWHOUSE PUBLISHING CO., PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER CO., MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, et al.,

Defendants.

On Appeal From: Superior Court of New Jersey; Law Division: Hunterdon County; Docket No.: L-91-4718; Trial Court Judges The Hon. Phillip Lewis Paley, J.S.C.; The Hon. David J. Schroth, J.S.C.

Civil (X) Criminal( ) Juvenile( )

[stamp—ORIGINAL FILED, JUL 27 1995, _____,
Emille R. Cox, Esq., Clerk]

NOTICE IS HEREBY GIVEN THAT Plaintiffs, Samuel Naro and Linda Naro, APPEALS TO THE SUPERIOR

COURT OF NEW JERSEY, APPELLATE DIVISION, FROM THE JUDGMENT ( ) ORDERS (xx) Other (Specify) ( )_____ entered in this action by The Hon. Phillip Lewis Paley, J.S.C., on October 6, 1994, granting summary judgment in favor of the Defendants, The Times, Peter Page, Richard Bilotti, The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, III, and the Order entered by the Hon. David J. Schroth dated June 26, 1995 quashing the Subpoena served upon Defendant, Paul Mickle.

IF APPEAL IS FROM LESS THAN THE WHOLE, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED:

Not applicable.

ARE ALL ISSUES AS TO ALL PARTIES DISPOSED OF IN THE ACTION BEING APPEALED ( ) Yes (XX) No. On June 26, 1995 at the onset of trial, the case was settled with the remaining Defendants.

If not, is there a certification of final judgment entered pursuant to R. 4:42-2 ( ) Yes (XX) No.

Priority under R. 1:2-5 ( ) Yes (XX) No. Application Section under the Rule_____

In Criminal, Quasi-Criminal and Juvenile Cases . . . Not Incarcerated ( ) Incarcerated ( ) Confined At:

Give a concise statement of the offense and of the judgment date entered and any sentence of disposition imposed.

APPENDIX G

SUPREME COURT OF NEW JERSEY
DOCKET NO.:
APPELLATE DIVISION DOCKET #: A-6485-94T2

LAW OFFICES OF
ROBERT A. BALLARD, JR., ESQUIRE
Liberty Court - Suite 1200
260 Highway 202-31
Flemington, New Jersey 08822
(908) 806-3171
ATTORNEYS FOR PLAINTIFF/PETITIONER

Civil Action

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPT., DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation; THE TRENTON TIMES, THE NEWHOUSE PUBLISHING CO., PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, AND RON ROE X,

Defendants

PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION

The Hon. Virginia Long; The Hon. Robert Muir, Jr.; The Hon. Marilyn Loftus

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey

Samuel Naro and Linda Naro, of 42 Ziegler Lane, Trenton, New Jersey, respectfully show:

1. That the Appellate Court erred in the application of *Romaine v. Kallinger,* 109 N.J. 282 (1988) in that the Appellate Division ignored the Plaintiffs' proofs as to actual malice.

2. That the Appellate Court erred in determining that the Plaintiff was a "limited purpose public figure".

These issues are more fully set forth in the annexed Brief in support of this Petition for Certification.

WHEREFORE, the Plaintiffs pray, for the reasons set forth herein, and in the annexed brief, that this Court grant certification.

Respectfully submitted,

/s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorney for Plaintiffs/Petitioners

I hereby certify that the foregoing petition presents a substantial question meriting certification, and that it is filed in good faith and not for purposes of delay.

/s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorney for Plaintiffs/Petitioners

Dated: September 17, 1996

APPENDIX H

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO. L91-4718

ROBERT A. BALLARD, JR., ESQUIRE
Liberty Court - Suite 120
260 Highway 202/31
Flemington, New Jersey 08822
(908) 806-3171
ATTORNEY FOR

Civil Action

SAMUEL NARO and LINDA NARO,
husband and wife

Plaintiffs,

v.

HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of The Trentonian, MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROE I, RON, ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON

ROE IX, RON ROE X (fictitious names meant to represent other employees of the Defendant newspapers whose identities are presently unknown;

Defendants.

COMPLAINT AND JURY DEMAND

[Filed stamp is illegible]

Plaintiffs, SAMUEL NARO and LINDA NARO, residing at 17 Ziegler Avenue, Trenton, County of Mercer, State of New Jersey by way of complaint against the Defendants, HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of the Trentonian, MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROE I, RON, ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X (fictitious names meant to represent other employees of the Defendant newspapers whose identities are presently unknown, say:

FIRST COUNT

1. The Defendant, The Newhouse Publishing Company, was on or about the 25th day of October, 1990 and at all times hereinafter mentioned, the owner of a newspaper known as The Times a/k/a Trenton Times, which circulated

in the area surrounding Trenton, New Jersey to include Mercer County, State of New Jersey.

2. The Defendant, Richard Bilotti, was on the above aforementioned date and at all times hereinafter mentioned, the publisher of The Times, a/k/a Trenton Times.

3. On the 25th day of October, 1990, the Defendant, Peter Page, was and at all times hereinafter mentioned, a staff writer of The Times, a/k/a Trenton Times.

4. Ron Roe I, Ron Roe II, Ron Roe III, Ron Roe IV, Ron Roe V, Ron Roe VI, Ron Roe VII, Ron Roe VIII, Ron Roe IX and Ron Roe X are fictitious names meant to represent other employees of the Defendant newspapers whose identities are presently unknown.

5. On the 25th day of October, 1990, the Defendant, Peter Page as an agent servant and/or employee of the Defendants, The Times, and/or Newhouse Publishing Company, falsely and maliciously wrote and published or cause to be written and published in said newspaper following words of and concerning the Plaintiff: "Is a suspect in the September 1989 murder of Majorie Szeker, Township Police confirmed yesterday".

6. By reason of the foregoing false and libelous statement, willfully and maliciously made by the Defendants aforesaid, the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neighbors and his community has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, The Times, a/k/a The Trenton Times, Newhouse Publishing Company, Richard Bilotti and Peter Page, and Ron Roe I, Ron Roe II, Ron Roe III, Ron Roe IV, Ron

Roe V, Ron Roe VI, Ron Roe VII, Ron Roe VIII, Ron Roe IX and Ron Roe X for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT TWO

1. The Plaintiffs repeat each and every allegation of Count One as though set forth at length herein.

2. The Defendant, Journal Register Company, was on the 26th day of October, 1990 and at all times hereinafter mentioned, the owner of a newspaper known as The Trentonian, which circulated in the area surrounding Trenton, New Jersey to include Mercer County, State of New Jersey.

3. The Defendant, H.L. Schwartz, III, was on the above aforementioned date and at all times hereinafter mentioned, the publisher of The Trentonian.

4. On the 26th day of October, 1990, the Defendant, Mark A. Waligore and Paul Mickle, were and at all times hereinafter mentioned, staff writers of The Trentonian.

5. Ron Roe I, Ron Roe II, Ron Roe III, Ron Roe IV, Ron Roe V, Ron Roe VI, Ron Roe VII, Ron Roe VIII, Ron Roe IX and Ron Roe X are fictitious names meant to represent other employees of the Defendant newspapers whose identities are presently unknown.

6. On the 26th day of October, 1990, the Defendants, Mark A. Waligore and Paul Mickle, as agents servants and/or employees of the Defendants, The Trentonian and/or Journal Register Company, falsely and maliciously wrote and published or cause to be written and published in said newspaper following words of and concerning the Plaintiff: The Trenton suspect owned a van at the time of the Marjorie Szeker murder, where a van was spotted fleeing the seen.

7. By reason of the foregoing false and libelous statement, willfully and maliciously made by the Defendants aforesaid,

the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neighbors and his community has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, The Trentonian, Journal Register Company, H.L. Schwartz, III, Mark A. Waligore and Paul Mickle, and Ron Roe I, Ron Roe II, Ron Roe III, Ron Roe IV, Ron Roe V, Ron Roe VI, Ron Roe VII, Ron Roe VIII, Ron Roe IX and Ron Roe X for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT THREE

1. The Plaintiffs repeat each and every allegation of the First and Second Counts as though set forth at length herein.

2. The Defendant, Hamilton Township, was and is a Municipal Corporation organized under the laws of the State of New Jersey.

3. Defendant, Thomas Pizzullo, was a police officer employed by the Hamilton Township Police Department at all times relevant to this Complaint.

4. John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, John Doe VII, John Doe VIII, John Doe IX and John Doe X are fictitious names meant to represent other police officers whose identities are presently unknown and who were involved in the investigation concerning the allegations in this Complaint.

5. On or about October 24th, 1990, the Defendant, Thomas Pizzullo, a Detective Captain with the Hamilton Township Police Department, acting as an employee, agent and/or servant of said Hamilton Township Police Depart-

ment did falsely and maliciously publish to third persons that the Plaintiff herein, Samuel Naro was a "suspect" in the September, 1989 murder of one Marjorie Szeker.

6. By reason of the foregoing false and slanderous statements, willfully and maliciously made by the Defendants aforesaid, the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neighbors and his community has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, Hamilton Township, Detective Captain Thomas Pizzullo, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, John Doe VII, John Doe VIII, John Doe IX and John Doe X, for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT FOUR

1. The Plaintiffs repeat each and every allegation of the First, Second and Third counts as though set forth at length herein.

2. The libelous and/or slanderous conduct by the Defendants was extreme, outrageous and was far beyond the bounds of decency as to be intolerable to a civilized community.

3. The emotional distress suffered by the Plaintiff was so severe as to be intolerable to a reasonable person.

4. By reason of the foregoing false and libelous statements and/or publications, willfully and maliciously made by the Defendants aforesaid, the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neighbors and his commu-

nity has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOES I through X; THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of The Trentonian, MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROES I through X, for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT FIVE

1. The Plaintiffs repeat each and every allegation of the First, Second, Third and Fourth Counts as though set forth at length herein.

2. Defendants' conduct as aforesaid in compromising the physical solitude and privacy of the Plaintiff was offensive to him, and would be offensive to a reasonable person.

3. The Defendants' conduct as aforesaid constitutes the tortious invasion of the Plaintiff privacy.

4. By reason of the foregoing false and libelous and/or slanderous statements and/or publications, willfully and maliciously made by the Defendants aforesaid, the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neigh-

bors and his community has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOES I through X; THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of The Trentonian, MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROES I through X, for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT SIX

1. The Plaintiffs repeat each and every allegation of the First, Second, Third, Fourth and Fifth Counts as though set forth at length herein.

2. Defendants knew that their statements and/or publications were false, and/or acted in reckless disregard of their falsity and of the false light in which the Plaintiff would be placed.

3. As a result of the Defendants' statements and publications as aforesaid, the Plaintiff was placed before the public in a false light which was offensive to him and would be offensive a reasonable person.

4. By reason of the foregoing false and libelous and/or slanderous statements and/or publications, willfully and

maliciously made by the Defendants aforesaid, the Plaintiff has been injured in his good name, fame and credit, and has brought into public disgrace and infamy amongst his neighbors and his community has suffered humiliation, shame, embarrassment and degradation and has further suffered and continues to suffer mental and emotional distress and has otherwise been damaged.

WHEREFORE, Plaintiffs demand Judgment against the Defendants, HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOES I through X; THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of The Trentonian, MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROES I through X, for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

COUNT SEVEN

1. The Plaintiffs repeat each and every allegation of the First, Second, Third, Fourth, Fifth and Sixth Counts as though set forth at length herein.

2. Plaintiff, Linda Naro is the wife of Plaintiff, Samuel Naro.

3. As a direct and proximate result of the aforesaid injuries to the Plaintiff, Samuel Naro, the Plaintiff Linda Naro will be and has been deprived of the consortium and services of the injured Plaintiff.

WHEREFORE, Plaintiff, Linda Naro, demands judgment against Defendants HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOES I through X; THE TRENTON TIMES; THE NEWHOUSE PUBLISHING COMPANY, owner of The Trenton Times; PETER PAGE, a staff writer of the Trenton Times; RICHARD BILOTTI, publisher of the Trenton Times; THE TRENTONIAN; JOURNAL REGISTER COMPANY, owner of The Trentonian; MARK A. WALIGORE and PAUL MICKLE, staff writers of the Trentonian; H. L. SCHWARTZ, III, publisher of the Trentonian; RON ROES I through X, for compensatory and punitive damages together with attorneys' fees, cost of suit and interest.

By: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.

Dated: October 14, 1991

CERTIFICATION

This is to certify that the matter in controversy in the within captioned Complaint is not the subject of any other action pending in any Court or pending in any arbitration proceeding.

By: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorney for Plaintiff

Dated: October 14, 1991

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that Robert A. Ballard, Esquire, is hereby designated as trial counsel in the within captioned matter.

By: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorney for Plaintiff

Dated: October 14, 1991

JURY DEMAND

PLEASE TAKE NOTICE that the Plaintiffs demand a jury of twelve on all issues herein.

By: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.
Attorney for Plaintiff

Dated: October 14, 1991

APPENDIX I

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 28, 1997

Ms. Helen E. Szabo
Espey & Szabo
260 Rte 202/31, Suite 600
Flemington, NJ 08822

Re.: Samuel L. Naro, et ux.
v. Hamilton Township, et al.
Application No. A-680

Dear Ms. Szabo:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on March 28, 1997, extended the time to and including June 6, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk

No. 96-1985

Supreme Court, U.S.
FILED
JUL 17 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

SAMUEL L. NARO and LINDA NARO, husband and wife,

Petitioners,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS *THE TIMES*, PETER PAGE AND RICHARD BILOTTI

DONALD A. ROBINSON
Counsel of Record
STEVEN L. LAPIDUS
ROBINSON, LAPIDUS & LIVELLI
Attorneys for Respondents The Times, Peter Page and Richard Bilotti
2 Penn Plaza East
Newark, New Jersey 07105-2237
(973) 690-5400

(800) 3 APPEAL • (800) 5 APPEAL • (800 BRIEF 21
Lutz Appellate Services, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent *The Times* states that it is published by The Times of Trenton Publishing Corporation, which is a subsidiary of Oregonian Publishing Company, which is a subsidiary of Advance Publications, Inc.

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Respondents *The Times*, reporter Peter Page and publisher Richard Bilotti ("the newspaper defendants") respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Samuel L. Naro and Linda Naro. The Petition asks this Court to review an unpublished per curiam opinion of the Appellate Division of the New Jersey Superior Court, after the Supreme Court of New Jersey declined to review the case. The opinion affirms summary judgment dismissing a defamation complaint on state law grounds. The Petition presents no issue warranting this Court's review.

RESPONDENTS' OBJECTIONS

Respondents object to Petitioners' Questions Presented and Statement of the Case. A Counter-Statement of the Case is set forth below and the questions presented by the Petition are set forth under Reasons for Denying the Writ section hereof.

STATEMENT OF THE CASE

A. Procedural History

The Times published an article on October 25, 1990 indicating that plaintiff Samuel Naro was a "suspect" in an unsolved murder investigation. The article detailed how plaintiff had been arrested for armed robbery, how plaintiff had used a disguise and weapons during the armed robbery similar to the *modus operandi* used in the unsolved murder, and how plaintiff's photograph bore a close resemblance to a composite sketch of the murder suspect. Most important, police officials stated that they viewed plaintiff as a "suspect" in the murder investigation.

After extensive discovery, the newspaper defendants moved for summary judgment. (Pa 32 to 62).[1] On October 6, 1994, the

1. All citations to appendices and briefs are to the appendices and briefs (Cont'd)

Law Division of the New Jersey Superior Court granted summary judgment dismissing all claims against the newspaper defendants. (Pa 397). The Law Division found that the articles were "true" and that plaintiffs' claims failed for lack of a showing of actual malice. The trial court's bench ruling was apparently also based on other state law privileges asserted by the newspaper defendants. (Transcript of October 6, 1994, at 5).

Petitioners appealed to the Appellate Division of the New Jersey Superior Court. On September 4, 1996, the Appellate Division, in an unpublished per curiam opinion, found that Naro was a limited-purpose public figure and, as a result, it was plaintiffs' burden to prove that any defamatory statements by the newspaper defendants were false and that the newspaper defendants either knew they were false or entertained serious doubts about their truth when the statements were published. (Petitioners' Appendix to Petition for Certification at 6-7 (hereinafter referred to as "Pet. App.")). The Appellate Division found that *The Times*' stories concerning Naro were based on statements of police officers and the factual circumstances of the armed robbery in which Naro was involved. (*Id.* at 7). Thus, the Appellate Division ruled that the "Naros failed to establish facts to sustain their burden that the statements were false and made with actual malice." (*Id.*). The Appellate Division further held, as an alternative ground for affirmance of summary judgment, that the newspaper defendants' allegedly defamatory stories "were protected by the fair report privilege," under New Jersey common law. (*Id.* at 8).

On January 6, 1997, the Supreme Court of New Jersey denied the Naros' petition for certification. (Pet. App. at 1). A Petition to this Court followed.

(Cont'd)
filed in the Appellate Division, unless otherwise noted. "Pa" refers to Plaintiffs' Appellate Division Appendix.

B. Statement of Facts

On October 23, 1990, petitioner Samuel Naro, a Trenton, New Jersey firefighter, was arrested and charged with armed robbery, burglary and illegal weapons possession. Naro had struck Andrew Horchak, age 78, in the face, then sprayed the elderly man with mace in the course of a robbery. (DTa 5 to 61).[2] According to police reports and witness statements, Naro used, and was apprehended with, a wig, fake mustache, dark sunglasses, a can of mace, a knife and other paraphernalia. (*Id.*).[3]

The following day, October 25, 1990, *The Times* published an article stating that Naro was "a suspect in the September, 1989 murder of Marjorie Szeker." (DTa 65 to 66). Szeker, a teacher at a local high school, had her throat slashed while unloading her groceries at a supermarket in Hamilton Township, New Jersey, apparently during an aborted robbery. Witnesses told the police that the killer drove a van and provided sufficient details of his description for police to prepare a composite sketch. (*Id.*). The crime had attracted substantial public interest and concern in the Trenton, New Jersey area, where *The Times* is distributed.

The article explained that Naro "bears such a striking resemblance to one of the composite sketches circulated after the killing that his fellow firefighters teased him about it." (*Id.*). Referring to Naro's use of a disguise during the Horchak robbery,

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2. "DTa" refers to the Appendix of Defendants/Respondents *The Times*, Peter Page and Richard Biolotti, which is attached to Defendants/Respondents' Brief filed in the Appellate Division.

3. On October 24, 1990, *The Times* published an article describing the attack and Naro's arrest. (DTa 63). The truth of that article has not been disputed by Naro.

Trenton Detective Captain Joe Golden was quoted in the article as stating that the use of rubber gloves, rope, tape, a knife, a dagger, and disguises indicated careful planning on Naro's part. Captain Golden added: "I don't think this was his (Naro's) first time." (*Id.*). Hamilton Township Detective Captain Thomas Pizzullo was quoted as stating about the Szeker murder investigation: "We are looking at everybody, and as soon as they said he used disguises, that he generally fits the composite and generally fits the height requirement, we got interested." (*Id.*). According to police, Naro had owned another van in 1989 and sold it shortly after the killing of Szeker. (*Id.*).[4]

On September 3, 1991, Naro was indicted on multiple counts of robbery and burglary in connection with his assault on Horchak. (DTa 71 to 84). On March 12, 1993, Naro was adjudged not guilty by reason of temporary insanity. (DTa 86 to 87). Significantly, Naro did not deny committing the acts alleged.

The Complaint in this action was filed on or about October 14, 1991. (DTa 89 to 100). Count One of the Complaint alleges that *The Times*' October 25, 1990 article, which states that Naro "is a suspect in the September, 1989 murder of Marjorie Szeker, Township Police confirmed yesterday," constitutes defamation. The other counts against the newspaper defendants, which allege intentional infliction of emotional distress, invasion of privacy, false light, and loss of consortium on behalf of the wife of Samuel Naro, all arise out of *The Times*' October 25, 1990 article.

Discovery established the truth of the allegedly defamatory statement. As part of its interrogatory answers, Hamilton

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4. The following day, October 26, 1990, *The Times* published a follow-up article in which Naro's attorney denied that his client was involved in the Szeker murder. In the front page story, Naro's attorney called speculation concerning Naro's involvement in the murder a "wild guess." (DTa 68 to 69).

Township produced the Certification of Police Chief Richard L. Taylor. (DTa 127 to 129). Chief Taylor's Certification states unequivocally that based on the circumstances of Naro's arrest, Naro was considered "to be a suspect in the Marjorie Szeker murder." (DTa 127 to 128, at ¶ 4). He further states that he advised Detective Captain Thomas Pizzullo, who was responsible for the Szeker murder investigation, "of the official position of the Hamilton Township Division of Police as to the status of Samuel Naro as a suspect in such investigation." (DTa 128, at ¶ 7). The Police Chief further authorized Pizzullo to communicate this position to *The Times* and Pizzullo did so. (DTa 128, at ¶¶ 7-8). Finally, and significantly, Chief Taylor states that he reviewed *The Times*' October 25, 1990 article about Naro when it was published, and again before he executed his certification, and he believes it "set forth the official statement that [he] made or authorized to be made on [his] behalf as the head of Hamilton Township Division of Police concerning the issue." (DTa 129, at ¶¶ 10-11).

At his deposition, Detective Captain Thomas Pizzullo confirmed Chief Taylor's statements that Naro was a suspect in the Szeker murder investigation when *The Times*' October 25, 1990 article was published. (DTa 132 lines 13-15). Detective Pizzullo further confirmed that, with Chief Taylor's authorization and on Chief Taylor's behalf, Pizzullo communicated this position to *The Times*. (DTa 133 to 135).

Naro's own deposition testimony supported his status as a "suspect." Naro admitted at his deposition that his co-workers saw a resemblance between him and the composite sketch of the Szeker killer. (DTa 118). Naro admitted that he had a van at the time of the Szeker murder; and there was evidence that the Szeker killer drove a van. (DTa 124). Naro admitted that he owned a wig, fake mustache, dark sunglasses, can of mace, knife and other paraphernalia used in the robbery of Horchak. (DTa

119 to 124). Thus, it is clear that Naro was a suspect and with good reason.

REASONS FOR DENYING THE WRIT

Petitioners have not and cannot demonstrate that the New Jersey Appellate Division "decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." Sup. Ct. Rule 10(c). The Petition asserts only that the New Jersey Appellate Division incorrectly determined that petitioner was a public figure and that he had failed to demonstrate actual malice. Neither issue involves an unsettled area of law or a conflict with other decisions. Petitioners only disagree with the Appellate Division's application of well established rules of law, which is not a basis for certiorari.

In this case, certiorari should be denied for three reasons. First, this Court lacks jurisdiction because there were adequate and independent state grounds for the state court decision. Second, petitioners failed to raise the limited purpose public figure issue below and, even if they had raised the issue, it was properly decided under settled law. Third, the state court properly applied well established rules of law in ruling that petitioners failed to establish actual malice or even demonstrate that the allegedly defamatory article was false. For each of these reasons, this Petition should be denied.

I.

THIS COURT IS WITHOUT JURISDICTION TO GRANT THE PETITION AS THERE WERE ADEQUATE AND INDEPENDENT STATE GROUNDS FOR THE STATE COURT DECISION.

This Court has refused to decide cases where there is "an adequate and independent state ground" out of "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Petitioners, however, are asking this Court to grant review of a state court decision with several adequate and independent state grounds: First, the state court found that plaintiffs' claims were barred by the fair report privilege, which is a state common law doctrine. (Pet. App. at 8). Second, the New Jersey court's application of the actual malice standard, about which petitioners complain, is governed by broad state law rules defining the standard in a manner intended to vindicate the State's broad protection afforded speech and expression. Third, there are other state law grounds justifying the state court decision.

A. The Common Law Fair Report Privilege Was An Independent And Adequate Ground For The State Court's Dismissal Of Petitioners' Claims.

After reciting the fair report privilege, the Appellate Division concluded that "the journalist reports in the *Times* . . . were protected by the fair report privilege." (Pet. App. at 8). The court relied only on the New Jersey Supreme Court's decision in *Costello v. Ocean County Observer*, 136 N.J. 594 (1994) and the RESTATEMENT (SECOND) OF TORTS § 611 in discussing the privilege; no federal law was cited or relied upon. (Pet. App. at 8). Clearly, the fair report privilege was an independent state law ground for dismissal of plaintiffs' case.

Moreover, it was an adequate ground, based on well-established state law derived from the RESTATEMENT (SECOND) OF TORTS, which summarizes the fair report privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

RESTATEMENT (SECOND) OF TORTS § 611, at 297 (1977). The commentary to Section 611 of the RESTATEMENT expressly states that the privilege applies to a "charge of crime made by the officer." *Id.* at § 611, comment h.

New Jersey courts have frequently applied the common-law privilege of Section 611 to immunize published reports of written and oral statements of governmental officials from libel claims. *See, e.g., Swede v. Passaic Daily News*, 30 N.J. 320, 331-35 (1959) (dismissing libel claims by police officers arising out of newspaper's publication of remarks made by city manager after city council meeting); *Orso v. Goldberg*, 284 N.J. Super. 446, 451 (App. Div. 1995) (directing summary judgment, under § 611 fair report privilege, dismissing libel claims by police officers arising out of newspaper's publication of remarks by city councilman during a private interview); *Molnar v. Star-Ledger*, 193 N.J. Super. 12, 20 (App. Div. 1984) (affirming summary judgment, under § 611 fair report privilege, dismissing libel suit against newspaper which had reported statements by deputy fire chief).

In *Molnar v. Star-Ledger*, the New Jersey Appellate Division affirmed summary judgment dismissing libel claims against a

newspaper based on the fair report privilege. In doing so, the court classified the oral comments of a Deputy Fire Chief interviewed about a suspicious fire as "official action," protected by the Section 611 fair report privilege. 193 N.J. Super. at 20.

More recently, in *Orso v. Goldberg*, the New Jersey Appellate Division reversed an order denying summary judgment, and remanded the case for entry of summary judgment in favor of a newspaper and reporter that published allegedly defamatory statements about town police officials by a town councilman during a press interview. In directing dismissal of the defamation claims, the court ruled that the fair report privilege extends even to "non-public interviews" with local officials. 284 N.J. Super. at 453.

As the state court ruled in this case, the statements of the Hamilton Township Police interviewed about the progress of an important murder case are also privileged. The allegedly defamatory statement that Naro was a "suspect" was made by a public official in the course of an interview. Thus, regardless of the issue of actual malice,[5] the newspaper defendants are protected by the state fair report privilege. Thus, the fair report privilege provides an independent and adequate state law ground for the state court's decision.

B. The State Law Rules Governing Application Of The Actual Malice Standard Provided An Independent And Adequate Ground For The State Court's Dismissal Of Petitioners' Claims.

In applying the actual malice standard in this case, the state court did not, as it did with the fair report privilege, rely solely

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5. *See Orso v. Goldberg*, 284 N.J. Super. at 455 (suggesting fair report privilege is sufficient to defeat a libel claim even if there is actual malice); RESTATEMENT (SECOND) OF TORTS § 611, comment a (same).

on state court decisions. However, the state law rules governing application of the actual malice standard, which provide broader application of the standard than under federal law, informed the decision. As such, they provide an independent and adequate ground for the state court's dismissal of the case.

The New Jersey Supreme Court has declared: "Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment." *New Jersey Coalition v. J.M.B. Realty*, 138 N.J. 326, 353 (1994); *see State v. Schmid*, 84 N.J. 535, 557-60 (1982). New Jersey provides greater protection of free speech, and in turn greater latitude for comments affecting reputational interests, than the First Amendment. The New Jersey Supreme Court provides this protection through a broader application of the actual malice standard than federal law requires. Specifically, the New Jersey Supreme Court, notwithstanding more restrictive views of other state and federal courts, has applied the actual malice standard to cases with certain types of non-public figure plaintiffs, *Sisler v. Gannett Co.*, 104 N.J. 256, 270-79 (1986), and to statements solely on the basis of their reference to matters of legitimate public concern, *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 139-48 (1986). This Court has no basis to review the New Jersey court's application of the actual malice standard, even if it was applied more broadly than provided in federal decisional law.

C. There Were Additional Independent And Adequate State Grounds For The State Court Decision, Though The State Court Did Not Reach Those Additional Grounds.

Because the state court ruled that the Complaint was barred by the fair report privilege, the truth of the allegedly defamatory article and the absence of actual malice, the state court never

addressed additional state law grounds for its decision. Such grounds, which are discussed below, would make any reversal by this Court under federal law an advisory opinion.

First, even if petitioner was not a limited purpose public figure, as the Appellate Division ruled, petitioner would still be required to prove actual malice under New Jersey's fair comment doctrine. New Jersey's doctrine of fair comment "extends to virtually all matters of legitimate public interest." *Dairy Stores v. Sentinel Pub. Co.*, 104 N.J. at 141.[6] The common law privilege of fair comment extends not only to expressions of "opinion," but likewise to statements of "fact." *Id.* at 148. The New Jersey Supreme Court, in defining a broad privilege of fair comment, has ruled that false statements of fact concerning matters of public concern are privileged from defamation liability unless that privilege is overcome by proof of actual malice. *Id.* at 151.

The fair-comment privilege applies to any alleged false statement of fact reported in *The Times*' article. The status of the investigation of the murder of a popular local teacher while grocery shopping was a matter of legitimate public concern. As such, plaintiff must establish that the newspaper defendants called him a "suspect" with actual malice, whether or not he was a limited purpose public figure. Plaintiff cannot make such a showing; he was a suspect and there is no evidence that the reporter believed plaintiff was not a suspect. Thus, the fair comment privilege protects the newspaper defendants from liability even if plaintiff was not a limited purpose public figure.

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6. *See, e.g., Kotlikoff v. The Community News*, 89 N.J. 62, 65 (1982) (statements about local property tax collection); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 382-83 (1959) (internal security during McCarthy era); *Hohl v. Mettler*, 62 N.J. Super. 62, 66-67 (App. Div. 1960) (potential drainage, health and fiscal problems from a proposed trailer park); *Mick v. American Dental Ass'n*, 49 N.J. Super. 262, 280, 282-83 (App. Div.), *cert. denied*, 27 N.J. 74 (1958) (fluoridation of drinking water).

Second, *The Times*' allegedly defamatory article is privileged under a New Jersey statute immunizing reports of official police statements. N.J.S.A. 2A:43-l provides:

> The privileged character attaching to the publication of judicial or other proceedings shall extend to the publication in any newspaper of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them, and which are accepted in good faith by the publisher of any newspaper, and the privileged character thereof shall be a good defense to any action for libel, unless malice in fact be shown by the plaintiff therein.

This statute was designed to protect law enforcement officials, and newspapers that publish their official statements, from just the kind of action brought by petitioners in this case.

Under N.J.S.A. 2A:43-l, regardless of whether Naro was a suspect, if law enforcement authorities stated that he was a suspect, newspapers were privileged to print it without fear of liability. Here, Police Chief Taylor made clear that it was his department's official position that Naro was a suspect. (DTa 128 at ¶ 7). That position was communicated to the newspaper defendants and they printed it. Thus, *The Times*' October 25, 1990 article describing Naro as a suspect is privileged under N.J.S.A. 2A:43-1 and cannot provide a basis for a defamation claim regardless of federal law governing the applicability of the actual malice standard.

II.

PETITIONERS FAILED TO RAISE THE PUBLIC FIGURE ISSUE BELOW AND, EVEN IF THEY HAD RAISED THE ISSUE, IT WAS PROPERLY DECIDED UNDER SETTLED LAW.

In both the Law and Appellate Divisions of the New Jersey Superior Court, petitioners acknowledged that in order to survive the motion for summary judgment, they had to establish an issue of fact with respect to whether the newspaper defendants published the statement that Samuel Naro was a "suspect" in the Szeker murder investigation with knowledge that he was not a suspect, or in reckless disregard as to whether or not he was a suspect, *i.e.* actual malice. (Pa 104, Pb 22).[7] Having failed to properly raise the issue in the lower courts, petitioners are not permitted to raise or contest the applicability of the actual malice standard in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992).

Even if petitioners had raised the actual malice issue below, their Petition would be without merit because the state court properly decided the issue under settled law. In its analysis of whether petitioner Samuel Naro was a limited-purpose public figure, the New Jersey Appellate Division relied on this Court's seminal First Amendment cases, including *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (Pet. App. at 6). The state court, quoting this Court, identified two categories of public figures to whom the constitutional libel standard of actual malice pertain: (1) "all-purpose" public figures and (2) "limited-purpose public figures." *Id.* at 344-45, 351. A limited-purpose public figure is an individual that "voluntarily injects himself or is drawn into a

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7. "Pb" refers to Plaintiffs' Appellate Division Brief.

particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* (Pet. App. at 6).

The New Jersey court went on to closely adhere to this Court's decision in *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), recognizing "that a person who engages in criminal conduct does not automatically become a 'public figure.' " *Id.* at 168-69. (Pet. App. at 6). The state court ruled that "public figure status of a criminal defendant, who is the subject of the alleged defamation in a libel case is to be determined no differently than in any other libel case; namely, by focusing on the 'nature and extent of an individual's participation in the controversy giving rise to the alleged defamation.' " *Id.* at 168-69. (Pet. App. at 6).

The state court recited the holding of *Wolston*, and applied it in a manner that gave petitioner the benefit a presumption that he would be treated as any other plaintiff (whether or not a criminal defendant) in determining whether the actual malice standard should apply. The law requires no greater protection for petitioner.

The state court did not find Naro to be a limited purpose public figure because he was a suspect in the Szeker murder, as petitioners suggest. Naro's status as a limited purpose public figure grew out of Naro's actions, which resulted in his arrest for a different crime *before* he was identified as a suspect in the Szeker murder investigation.

Contrary to his assertion, Naro was not thrust into the limelight of the Szeker investigation through no fault of his own. Naro placed himself into the Szeker limelight by committing a criminal act with a *modus operandi* similar to that used to murder Marjorie Szeker. If plaintiff had not donned a disguise and brutally beaten and attempted to rob Andrew Horchak, plaintiff

would not have attracted the suspicion of the Hamilton Township Police Department. Thus, plaintiff cannot be heard to complain that he involuntarily became a limited-purpose public figure.

It is true that, under *Wolston*, a person who engages in criminal conduct does not "automatically" become a public figure. The state court recognized this principle of law. (Pet. App. at 6). It does not follow, however, that such a person is necessarily not a public figure. Often, those who engage in criminal conduct are public figures. In *Wolston*, the plaintiff was found not to have lost his private status when he was unable to respond to a subpoena because of health problems. *Id.* at 168-69. Here, the conduct at issue was much more culpable.[8]

The state court accurately set forth this Court's rules of law in limited-purpose public figure jurisprudence. The state court also applied those rules of law correctly. Even if it had misapplied the law, as petitioners contend, however, that is not a basis for granting the Petition. Sup. Ct. Rule 10.

III.

THE STATE COURT PROPERLY RULED THAT PETITIONERS FAILED TO DEMONSTRATE ACTUAL MALICE.

Petitioners contend that they demonstrated actual malice. They are mistaken. The New Jersey courts correctly set forth and applied the actual malice standard. (Pet. App. at 7).

In order to meet the "actual malice" test, as the state court

8. Moreover, even if Naro was not a limited-purpose public figure, such that he triggered application of the actual malice standard, he was a firefighter employed by the City of Trenton. As a public official, he would be subject to the same actual malice standard in New Jersey. *See Costello v. Ocean County Observer*, 136 N.J. at 613.

recognized, "a public figure [or public official] must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false." *Lawrence v. Bauer Publishing & Printing Ltd.*, 89 N.J. 451, 466, *cert. denied*, 459 U.S. 999 (1982), *applying New York Times v. Sullivan*, 376 U.S. at 279-80. Libel defendants have not acted with "reckless disregard" under the *Sullivan* rule unless they have published defamatory statements with "a high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1974), *quoted in Lawrence v. Bauer*, 89 N.J. at 466.

The New Jersey Supreme Court, consistent with the broad free speech protections it recognizes, has taken a strict view of the showing required to satisfy plaintiffs' actual malice burden:

> The actual-malice standard is subjective. . . . Accordingly, the inquiry concerns [the defendant's] state of mind. To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that the defendant had a subjective awareness of the story's probable falsity.

Costello, 136 N.J. at 615; *accord Lawrence v. Bauer*, 89 N.J. at 467-68. (Pet. App. at 7).

Petitioners have presented no evidence that the newspaper defendants knew Naro was not a suspect or entertained serious doubts about whether he was a suspect. As the state court found, the newspaper defendants relied on comments of police officers (some specifically identified) and the factual circumstances surrounding the Horchak robbery. (Pet. App. at 8). Such reliance belies any claim of actual malice.

Petitioners complain that it was not clear from the newspaper defendants' article that Naro was just one of many suspects. Yet, *The Times*' article identifying Naro as a suspect quoted the police as stating that Naro "does fit the composite, but there are so many people that fit the composite that it doesn't mean a lot"; and that "the investigation of Naro was not a break in the case but just a lead that has to be checked." (DTa 66).

Naro's argument boils down to an assertion that although he was a suspect, he should not have been. Given the facts surrounding his earlier assault, there was considerable support for Naro's status as a suspect. However, whether or not he should have been a suspect does not alter the undisputed fact that he was a suspect.

With the uncontroverted statements of Hamilton Township Police Chief Taylor and Detective Captain Pizzullo that Naro was a suspect in the Szeker murder, and that this official position of the police department was communicated to *The Times*, no reasonable juror could conclude that *The Times* published the statement that Naro was a suspect with knowledge that it was false or in reckless disregard as to whether or not it was false. (DTa 127 to 129; DTa 132). The facts which provided the basis for the statement — the robbery with use of disguises and deadly weapons, Naro's likeness to the composite sketch of the Szeker killer and his ownership of a van — provided the rationale for Hamilton Township's position that Naro was a suspect in the Szeker murder.

The record is bereft of clear and convincing (or any) evidence that the newspaper defendants believed that the allegedly defamatory statement reported in the article was false. Nor is there a shred of proof that the newspaper defendants subjectively "entertained serious doubts as to the truth" of the information published about Naro. On the contrary, the article

was derived from information communicated by police officials, officials with whom *The Times*' reporter typically had day-to-day contact in the regular course of covering local events in Hamilton Township. Thus, this Court has no reason to disturb the state court's dismissal of petitioners' case for their failure to demonstrate the requisite actual malice.

IV.

THE STATE COURT PROPERLY RULED THAT PETITIONERS FAILED TO MEET THEIR CONSTITUTIONAL BURDEN OF PROVING ANY STATEMENTS WERE FALSE.

Plaintiffs have a constitutional burden under the First Amendment of proving that any allegedly defamatory statements published about them in *The Times* were, in reality, false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768, 777-79 (1986); *Romaine v. Kallinger*, 109 N.J. 282, 289 (1988). This constitutional burden of proving falsity must be shouldered by all libel plaintiffs, including petitioners in this case. 475 U.S. at 777-78.

Petitioners cannot establish the falsity of the statement reported in the *The Times*' article that Naro was a "suspect" in the Szeker murder. The Hamilton Township Police have testified, both through Police Chief Taylor and Detective Captain Pizzullo, without dispute, that Naro was a suspect in the Township's investigation of the Szeker murder. (DTa 127 to 129; DTa 132).[9]

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9. "In assessing the [allegedly defamatory] language, the court must view the publication as a whole and consider particularly the context in which the statement appears." *Romaine v. Kallinger*, 109 N.J. at 290. The newspaper defendants did not state that Naro committed the murder or that he was the only suspect. The article in which the allegedly defamatory statement appears (Cont'd)

The Times set forth the official position of the Hamilton Township Police Department that Naro was a suspect. (DTa 127 to 129; DTa 132). As the state court found, the statement was true. (Pet. App. at 8). Therefore, it cannot be actionable and does not require this Court's review.

(Cont'd)
makes clear, through statements of Detective Pizzullo, that "the investigation of Naro was not a break in the case but just a lead that has to be checked," and that while Naro fit the composite, "there are so many people that fit the composite that it doesn't mean a lot." (DTa 66). In the article, *The Times* explained the factual basis for the police's suspicion of Naro: (1) Naro's use of weapons and a disguise in connection with the robbery; (2) Naro's resemblance to the composite sketch of the killer; (3) Naro's meeting the height of the killer; and (4) the fact that Naro's colleagues at work joked with him about fitting the killer's description and selling his van shortly after the murder. (DTa 65 to 66). These facts are not disputed. In a front page story the day after the article, *The Times* published Naro's attorney's denials of his client's culpability. (DTa 68 to 69). The facts that formed the basis of the suspicion of Naro — the robbery, the weapons, the disguises, the resemblance — were never denied.

CONCLUSION

For all of the foregoing reasons, defendants/respondents *The Times*, Peter Page and Richard Bilotti respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 96-1986

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUL 17 1997
CLERK

October Term, 1996

SAMUEL L. NARO and LINDA NARO, husband and wife,

Petitioners,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE AND H.L. SCHWARTZ, III

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LIST OF PARTIES

The petition inaccurately lists John Does and Ron Roes, fictitious names, that were not identified and made parties at the trial level. Therefore, they are not parties to this proceeding. In addition, defendants Hamilton Township, Hamilton Township Police Department and Detective Captain Thomas Pizzullo are not parties to this proceedings.

The Trentonian is a trade name for a newspaper published by Capitol City Publishing Co., Inc., which is a wholly owned subsidiary of Journal Company, Inc., which is a wholly owned subsidiary of Journal Register Company, LLC. There are no nonwholly owned subsidiaries of respondent, *The Trentonian*.

There are no parent companies or subsidiaries of respondent Journal Register Company, which is now known as Journal Register Newspapers, Inc.

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The Times 1

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law *** abridging the freedom of speech ***."

N.J.S.A. 2A:43-1 provides as follows:

> The privileged character attaching to the publication of judicial or other proceedings shall extend to the publication in any newspaper of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them, and which are accepted in good faith by the publisher of any newspaper, and the privileged character thereof shall be a good defense to any action for libel, unless malice in fact be shown by the plaintiff therein.

STATEMENT OF THE CASE

As more fully set forth below, there is no cause for this Court's review of the decision of the New Jersey Superior Court Law Division as affirmed by the New Jersey Superior Court Appellate Division.

The petitioners' argument is that the two local newspapers in Trenton, New Jersey, *The Trentonian*[1] and *The Times*, should not have published statements made by police officials of

---

1. *The Trentonian*, Journal Register Co., Mark A. Waligore, Paul Mickle and H.L. Schwartz, III are all referred to hereafter as *The Trentonian* respondents.

Hamilton Township, New Jersey that Mr. Naro was a suspect in a murder case.

Both the trial judge and the New Jersey Appellate Division found that the petitioners did not meet their burden of proof with respect to malice. The Appellate Division's decision also specifically adopted the Restatement (Second) of Torts § 611, at 297 (1977) that the reports of the media respondents in this case were protected by the fair report privilege.

The petitioners cannot dispute that the Chief of Police of Hamilton Township, New Jersey, Richard L. Taylor specifically stated that:

> Based on all the circumstances, the Hamilton Township Division of Police for a period of time considered Samuel Naro to be a suspect in the Marjorie Szeker murder.
>
> As the head of the Hamilton Township Division of Police, I told a reporter for *The Trentonian* that we considered Samuel Naro a suspect in the Marjorie Szeker murder.
>
> I made the statement as head of the Division of Police and it was an official statement. I expected that the reporter would utilize the information in articles that would be printed in *The Trentonian*.
>
> I have also reviewed the articles of *The Trentonian* published on October 24, 1990, October 25, 1990, October 26, 1990, October 27, 1990 and October 29, 1990 as well as articles of *The Trenton Times*

> published on October 24, 1990, October 25, 1990 and October 26, 1990 in preparing this Certification.
>
> I also advised Captain Pizzulo that he was authorized to communicate this official position to the news media, including *The Trenton Times* and *The Trentonian*.
>
> I was aware of the press coverage concerning Samuel Naro and the Szeker murder that appeared in both *The Trentonian* and *The Trenton Times* in October of 1990.
>
> At the time I originally read them and again upon reviewing them now, I feel that the articles set forth the official statements that I made or authorized to be made on my behalf as the head of Hamilton Township Division of Police concerning the issue. (Plaintiffs' Appendix New Jersey Superior Court Appellate Division 72a to 74a).

While it is true that the petitioners alleged that *The Trentonian* "falsely, libelously and maliciously wrote and published in its newspaper an article which stated that the Trenton suspect owned a van at the time of the Szeker murder and that the vehicle was seen fleeing the scene." (Pet. at 2), that allegation was inaccurate. The petitioners' statement that they alleged such an article was published on October 25, 1990 is also inaccurate. The petitioners' complaint made that allegation about a publication of October 26, 1990.

The October 26, 1990 article (Plaintiffs' Appendix New Jersey Appellate Division 69a) did not make such a statement. Rather it reported that:

> Hamilton Police, who were looking for a van that speed from the murder scene, report that Naro owns a van.

The Trentonian October 25, 1990 article (Plaintiffs' Appendix New Jersey Appellate Division 66a to 68a) merely reported information provided by the police which explained their reasons for wanting to interview Mr. Naro about the Szeker murder. In fact, *The Trentonian* reported the next day, October 26, 1990, that while the police were investigating the question of whether the van owned by Mr. Naro was involved in the Szeker murder that there were differences in the van owned by Mr. Naro and the van seen leaving the Szeker murder scene. (Plaintiffs' Appendix New Jersey Appellate Division 69a).

Petitioner Samuel Naro was arrested on October 23, 1990 on assault and related charges that he attacked Andrew Hrabchak on the porch of his house near the fire station where Naro worked. Naro was wearing a false mustache and dark sunglasses. His duffel bag found at the scene contained a wig and other disguises.

Mr. Naro's defense on the assault and related charges was based on a psychiatric defense, not that he did not commit the offenses.

The petitioners cite the deposition of Chief of Police Taylor (Pet. at 3). However, that deposition was not taken until after summary judgment had been granted to the media respondents and has not been part of the appellate record. *The Trentonian* respondents do not presently have a copy of that transcript and, therefore, cannot state whether the statements attributed to Chief Taylor are in fact correct. Judge Paley had Chief Taylor's certification which clearly and unequivocally stated that he had told *The Trentonian* reporter that Mr. Naro was in fact a suspect in the Szeker murder case. It should be noted that the certification

was a pleading containing the name of the law firm representing the Hamilton Township police defendants and is unequivocal that the Hamilton Township police, including Chief Taylor, considered Naro a suspect. The petitioners' contention (Pet. at 5) that *The Trentonian* labeled Mr. Naro a suspect in its October 25, 1990 article is another mischaracterization of the record. The headline stated that "Fireman to be quizzed in teacher slay." It does not state that he is a suspect. *The Trentonian* respondents also deny that six (6) of the seven (7) articles labeled Mr. Naro a suspect.

The statement in petitioners' petition at page 5 that "a later *Trentonian* article insinuated that plaintiff owned a van similar to the one seen at the murder scene," as shown above, misstates the article. It is further disputed that "no investigation was conducted by the police regarding plaintiff, except with regard to a van which he allegedly owned." It is undisputed that the Hamilton Township police, including Chief Taylor, labeled Naro a suspect. Obviously they conducted at least a mental examination of the facts surrounding the Hrabchak assault.

Petitioners reference to a subsequent article in *The Trentonian* concerning another suspect, Rivera, is clearly not relevant since it concerns information developed over eight (8) months after the police allegations concerning Mr. Naro.

The trial judge, Judge Philip L. Paley, in addition to relying upon *New Times v. Sullivan*, 376 U.S. 254 (1964) "and other authorities cited before me" also found:

> I am satisfied that the articles appear to be, and were at the time, true. The affidavit of Chief Taylor clearly reflects the fact that the police did consider Mr. Naro a suspect for a period of time. . . . But when Hamilton

> Township, through its police chief, caused the utterance of a public statement intended to be published, I cannot say that the newspapers should be obligated to continue their defense of this case when all the newspapers did was to repeat that statement.

REASONS FOR DENYING THE WRIT

The petitioners' argument that the Hamilton Township police should not have labeled Mr. Naro a suspect ignores the rulings of Judge Paley and the Superior Court of New Jersey Appellate Division and the undisputed facts of the case that in fact Mr. Naro was labeled a suspect in the Szeker murder case by the Hamilton Township police, including Chief Taylor. Since Mr. Naro in fact was a suspect, there were no false facts reported which is the threshold requirement for consideration of a libel action. *New York Times v. Sullivan, supra.*

Judge Philip L. Paley relied not only on *New York Times v. Sullivan, supra.*, but also "other authorities cited before me." Those other authorities included a New Jersey statute, N.J.S.A. 2A:43-1 that, independently of the First Amendment to the Constitution of the United States provides protection and in fact encourages newspapers to report issues of a public nature concerning the criminal justice system by providing a privilege to report official statements issued by police department heads. It is undisputed that Chief Taylor was the head of the Hamilton Township police when he told a reporter for *The Trentonian* that they considered Mr. Naro a suspect in the Szeker murder.

The protections afforded under New Jersey law are independent of those afforded by the First Amendment. *Cassidy v. Merin*, 244 N.J. Super. 466, 483 (App. Div. 1990). Even publishing a "careless and perhaps irresponsible account of the

information received concerning the scope of the City Attorney's investigation . . ." was " 'constitutionally insufficient' to present a jury question of actual malice." *Lawrence v. Bauer Publishing & Printing, Ltd.*, 89 N.J. 451, 468 (1982) (citing *New York Times supra*, 376 U.S. at 288).

Mr. Naro's bizarre behavior, including the assault of a seventy-eight (78) year old man, the Hamilton Township police considering him a suspect in a murder case and his status as a public employee, were certainly an appropriate basis for the Appellate Division to find that he was a limited purpose public figure. *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). However, the Appellate Division's decision further ruled that the reports in the newspaper of a true fact, that Mr. Naro was a suspect, "were protected by the fair report privilege." Restatement (Second) of Torts § 611, at 297 (1977) provides that:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

Mr. Naro has settled with the Hamilton Township police alleging that they improperly labeled him a suspect. He cannot recover from media respondents for publishing the undisputed fact he was labeled a suspect by the Hamilton Township police. The media respondents were performing their obligation to report police allegations concerning a murder suspect.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
JUL 25 1997
CLERK

No. 96-1986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SAMUEL L. NARO AND LINDA NARO, HUSBAND AND WIFE,

Petitioners,

v.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX AND RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF

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July 25, 1997

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26 pp

Respondents representing the Times, Peter Page and Richard Bilotti (hereinafter, the Times respondents) assert that this Court is without jurisdiction to grant the petition because there was adequate and independent state grounds for the state court decision (Rb7).[1] In this respect, they refer to the Appellate Division's ruling regarding fair report privilege. Petitioners maintain that the Appellant Division ruling was so intertwined with the instant federal constitutional issue as not to comprise a truly independent state law ground.

In its ruling regarding the fair report privilege, the Appellate Division relied on *Costello v. Ocean County Observer*, 136 N.J. 594 (1994). That opinion, however, was based on a combined ruling regarding the state fair report privilege, as well as the traditional federal First Amendment analysis as to public figures. *State v. Costello*, *supra* at 611-612. The state and federal rulings were so interwoven as not to be independently separable. Under the circumstances, the state court's ruling did not comprise an independent state ground of the type that would preclude this Court's review. *See St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981); *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931).

The Times respondents also contend that the limited purpose public figure issue was not raised by petitioners in the state court. (Rb13). Petitioners sharply dispute this contention. As reflected by the briefs filed by petitioners and by the Times respondents before the New Jersey Appellate Division, this issue was clearly raised by both parties. Therefore, petitioners are not barred from raising it before this Court.

Specifically, in their Appellate Division brief, petitioners argued that petitioner, Samuel Naro was involuntarily thrust

---

[1] "Rb" refers to the brief by the Times respondents that was filed in opposition to petitioners' petition for writ of certiorari brief.

into the public limelight as a result of his arrest for assault, which preceded the newspaper articles at issue. (RA-20). In this respect, petitioners stated as follows:

> Mr. Naro, without his consent, was thrust onto the front pages of the Defendant newspapers as a result of his arrest, although he was subsequently acquitted. This attempt by the Defendant newspapers to create a public figure in Mr. Naro was the impetus for the alleged justification of Defendants to publish the libelous articles which form the basis of this Complaint.

(RA-20).

In their response brief to petitioners' Appellate Division brief, the Times respondents extensively discussed the jurisprudence applicable to limited purpose public figures. (RA-10 to RA-12). In this respect, the Times respondents cited some of the identical cases which they now cite before this Court.[2] They specifically argued that petitioner was a limited purpose public figure as follows:

> As in *Marcone* and *Ruebke*, Naro's robbery arrest was widely reported prior to his being implicated in the investigation of the Szeker murder. As such, he qualifies as a limited purpose public figure.

---

[2] Specifically, the Times respondents cited the following opinions regarding this area: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Marcone v. Penthouse International Magazine for Men*, 754 F. 2d 1072 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1985); *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 738 P.2d 1246 (1987). (RA-10 to RA-11).

> Contrary to his assertion, Naro was not thrust into the Szeker limelight through no fault of his own. (Pb2). Naro placed himself into the Szeker limelight by committing a criminal act with a modus operandi apparently similar to that used to murder Marjorie Szeker. If Naro had not donned a disguise and brutally beaten Andrew Horchak while attempting to rob him, Naro would not have attracted the suspicion of the Hamilton Township Police Department. Thus, he cannot be heard to complain that he involuntarily became a limited-purpose public figure.

(RA-11 to RA-12).

Petitioners in their reply brief explicitly argued that petitioner, Samuel Naro, was not a public figure. (RA-4). Petitioners' reply brief stated the following:

> The Plaintiff, Sam Naro, was not a public figure, but a private citizen, who received more front page news coverage with a false story than most public figures receive for factual stories. The fact that Sam Naro is a firefighter does not place him in the realm of a "public figure".

(RA- 4).

Under the circumstances, for the Times respondents to now state that the issue of a limited purpose public figure was not raised before in the state courts is a gross misstatement. This issue was clearly raised both offensively and defensively in the state courts and cannot be construed as procedurally barred.

Respectfully submitted,

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July 25, 1997

Appendix

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2
CIVIL ACTION

SAMUEL NARO and LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,
Defendants/Respondents

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO.: L-91-4718

SAT BELOW

The Hon. Phillip Lewis Paley, J.S.C.
The Hon. David J. Schroth, J.S.C.

REPLY BRIEF AND APPENDIX FOR PLAINTIFFS/APPELLANTS SAMUEL NARO AND LINDA NARO

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* * * * * * * *

[Tables omitted in printing]

* * * * * * * *

STATEMENT OF FACTS

For purposes of this Reply Brief, the Statement of Facts submitted in support of the initial brief filed by Plaintiff/Appellants is adopted.

PROCEDURAL HISTORY

The Procedural History set forth by the Plaintiff/Appellants in the initial appellate brief is adopted herein. In addition, on November 21, 1995, Plaintiff/Appellants' filed a Brief and three part Appendix in support of this Appeal. On January 15, 1996, a Reply Brief and Appendix of the Defendant/Respondents, The Times, Peter Page and Richard Bilotti was received by Plaintiffs' counsel. On January 29, 1996 a Reply Brief and Appendix was received by Plaintiffs' counsel from Defendant/Respondents, The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, III. This Reply Brief is submitted on behalf of Plaintiff/Appellants in opposition to that Brief.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IN FAVOR OF THE TRENTONIAN DEFENDANTS WAS IMPROPERLY GRANTED, AS EVIDENCED BY THE DEPOSITION OF CHIEF TAYLOR AND OTHER PROOFS.

In the case before this tribunal, the Defendants have squarely rested the burden of proof on the Plaintiffs, where that burden certainly lies. However, the fact as *proven* by the Plaintiffs, and set forth before the Trial Court in opposition to the summary judgment motions of these Defendants, was sufficient to defeat summary judgment at that time. The Defendant/Respondents, The Trentonian, Journal Register Company, Mark Waligore, Paul Mickle and H.L. Schwartz, III, can merely point to the Plaintiff, and a totally unrelated incident, in an attempt to smear the Plaintiff's reputation, somehow justifying their libelous attack on Plaintiff, Sam Naro. The facts, as set forth below, which should have defeated the summary judgment motion are quite simply stated as follows:

1. The profile of the murder suspect composite and van never fit Sam Naro, and the newspaper Defendants were well aware of this fact.

2. The newspaper Defendants had printed prior articles in their own newspapers about the Szeker murder in 1989, that clearly demonstrated that the Plaintiff, Sam Naro, did not fit the profile of the murder suspect by age, weight, and van, which should have raised reasonable doubt in their minds to print such a horrific story without further investigation.

3. The Defendant newspapers, The Times and The Trentonian, knowingly let the public believe that Sam Naro looked like the actual murder suspect composite, when, in fact, these papers knew quite clearly that they were referring to the so-called van driver "accomplice" composite, who

was wanted in 1989 for questioning only, according to their own newspaper stories.

4. It was the Defendant, The Trentonian, through its reporter, Defendant, Paul Mickle, according to Chief Taylor's deposition, (Pa443) that called the Hamilton Township Police and told them that Sam Naro was a murder suspect. The Hamilton Township Police indicated that this was the first that they had heard of such an accusation at that time. In short, The Trentonian used the Hamilton Township Police as their reliable source, when in fact, *it was The Trentonian that was the source to the police*. Then, The Trentonian knowingly distorted the police statements to mislead and confuse the public.

5. According to the certification of Kevin Pollard (Pa468), which was submitted by Defendants in support of summary judgment motions, there was nothing in the Hamilton Township Police file about Sam Naro being a suspect, or any other investigation of Sam Naro, therefore, the Hamilton Township Police could not have considered Sam Naro a suspect. Further, Chief Taylor, as set forth in the previous Brief in support of this Appeal, replied "no" to the newspapers when they asked him if Sam Naro was a suspect in the murder. These issues are precisely those issues which demanded that this matter proceed to a jury trial.

6. The deposition of Hamilton Township Police Chief Taylor was contrary to the certification (Pa72) which he provided for the newspaper Defendants.

7. The Plaintiff, Sam Naro, was not a public figure, but a private citizen, who received more front page news coverage with a false story than most public figures receive for factual stories. The fact that Sam Naro is a firefighter does not place him in the realm of a "public figure".

These facts, along with those facts set forth in support of this appeal, demonstrate clear proof that the newspaper Defendants acted with malice, and a complete disregard for the Plaintiff's rights in this matter. A trial on these issues would have further demonstrated the contradiction contained in the defense's version of what occurred, however, no trial ever occurred, since the newspaper Defendants were permitted to hide behind the cloak of Chief Taylor's false certification.

POINT II

THE TRIAL COURT IMPROPERLY QUASHED THE SUBPOENA SERVED UPON THE DEFENDANT, PAUL MICKLE.

Although the Defendant, Paul Mickle, properly points to N.J.S.A. 2A:84A-21.3, as the basis for asserting a newspaperman's privilege, the Plaintiff had demonstrated, under N.J.S.A. 2A:84A-21.3(b), the necessity for Mr. Mickle's testimony at the time of trial.

Although the Plaintiff had sought the information concerning this conversation between The Trentonian reporter, Paul Mickle, and Hamilton Township Chief of Police Taylor (a conversation which was not an *alleged* conversation but an *actual* conversation), from Chief Taylor, Chief Taylor's version of that conversation in his deposition contradicts the certification which he provided to the newspaper Defendants in support of their motion for summary judgment. Further, if Chief Taylor's deposition testimony is to be believed, Chief Taylor's version of what occurred in that phone conversation contradicts the reported story by Mr. Mickle in The Trentonian, in which Sam Naro was identified as a suspect.

At the time of the issuing of the subpoena, the newspaper Defendants, and the newspaper reporters, had been dismissed from the case. The only remaining Defendants were Hamilton Township Police Department and Chief Taylor. It

was necessary for the Plaintiffs, in order to prove their claims against Hamilton Township Police Department to seek, from reporter Mickle, the content of his conversation with Chief Taylor. Instead, due to Judge Schroth's decision to quash the subpoena, the Plaintiffs were left with no ability to contradict Chief Taylor's testimony by presenting the testimony of the individual with whom he had a conversation. At that point in the case there was absolutely no reason to protect the newspaperman's privilege, since Chief Taylor had already identified himself as the "source", and had indicated the nature of his conversation, and the content thereof. The necessity to protect the newspaperman's privilege was clearly outweighed by the Plaintiffs' rights in procuring the truth, and in being able to adequately prove a defamation claim. For that reason, the subpoena should not have been quashed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Plaintiffs' appeal be granted.

Respectfully submitted,

BY: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.

Dated: February 12, 1996

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NEW JERSEY SUPERIOR COURT
LAW DIVISION - MERCER COUNTY
DOCKET NO. L-91-4718

Civil Action

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs,

v.

HAMILTON TOWNSHIP, et als.

Defendants.

CERTIFICATION OF KEVIN POLLARD

I, KEVIN POLLARD, of full age, hereby certify as follows:

1. I am employed by the Hamilton Township Division of Police holding the rank of Lieutenant, and I am in charge of the Detective Bureau.

2. I am fully empowered to make this Certification.

3. I have thoroughly reviewed the investigatory records in the possession of the Hamilton Township Division of Police concerning the Marjorie Szeker murder investigation, for the purposes of ascertaining whether any documents identified

Samuel Naro as a suspect in such investigation or otherwise referred in any way to Samuel Naro.

4. There are no documents in the possession of the Hamilton Township Division of Police as described in ¶3 preceding.

I certify the foregoing statements made by me are true. I am aware that if any of the foregoing is willfully false, I may be subject to punishment.

/s/ Kevin Pollard
Kevin Pollard

Dated: July 21, 1994

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2

SAMUEL NARO AND LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VII, RON ROE IX and RON ROE X,
Defendants/Respondents.

On Appeal From The Superior Court Of New Jersey
Mercer County, Law Division
Docket No. L-91-4718

Sat Below:

Honorable Phillip Lewis Paley, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS/RESPONDENTS *THE TIMES*, PETER PAGE AND RICHARD BILOTTI

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Attorneys for Defendants/Respondents *The Times*, Peter Page and Richard Bilotti

On the Brief: Steven L. Lapidus

* * * * * * *

POINT V

PLAINTIFFS CANNOT ESTABLISH "ACTUAL MALICE" AS REQUIRED BY THE FIRST AMENDMENT AND THE LAW OF NEW JERSEY

Libel plaintiffs having the constitutional status of "public officials" or "public figures" cannot recover unless they establish by clear and convincing proof that the defendants published false and defamatory statements about them with "actual malice," i.e. with knowledge of falsity or with reckless disregard of the publication's truth or falsity. *New York Times v. Sullivan,* 376 U.S. 254, 280, 286 (1964) (applying "actual malice" test to speech about public officials); *see also Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) (extending *Sullivan* test to speech concerning public figures).

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the Supreme Court identified two categories of public figures to whom the constitutional libel standard of actual malice pertain: so-called (1) "all-purpose" public figures and (2) "limited-purpose public figures." *Id.* at 344-45, 351. The former category describes persons that "achieve such perva-

sive fame or notoriety that he [or she or it] becomes a public figure for all purposes and in all contexts." *Id.* A limited-purpose public figure, on the other hand, is an individual that "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* In either instance, such persons "invite attention and comment," *id.* at 345, and "assume special prominence in the resolution of public questions." *Id.* at 351. That determination turns on two principal factors: (1) whether the alleged defamatory statements in issue relate to a "public controversy" or a "topic of legitimate public concern" and if so, (2) the "nature and extent" of plaintiff's participation in the controversy. *Vassallo v. Bell,* 221 N.J. Super. 347, 366 (App. Div. 1987); *see Sisler v. Gannett Co.,* 104 N.J. 256, 267 (1986).

The Times' statement that Naro was a "suspect" in the Szeker murder was surely a "topic of legitimate public concern." Moreover, Naro's participation in the armed robbery of Horchak, with the use of weapons and disguises, constitutes a voluntary participation in a public controversy. Courts have repeatedly found that suspects in criminal cases, particularly serious cases, are limited-purpose public figures. *See, e.g., Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072, 1085 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985); *Ruebke v. Globe Communications Corp.,* 241 Kan. 595, 738 P.2d 1246 (1987). As in *Marcone* and *Ruebke,* Naro's robbery arrest was widely reported prior to his being implicated in the investigation of the Szeker murder. As such, he qualifies as a limited-purpose public figure.

Contrary to his assertion, Naro was not thrust into the Szeker limelight through no fault of his own. (Pb2). Naro placed himself into the Szeker limelight by committing a criminal act with a modus operandi apparently similar to that used to murder Marjorie Szeker. If Naro had not donned a

disguise and brutally beaten Andrew Horchak while attempting to rob him, Naro would not have attracted the suspicion of the Hamilton Township Police Department. Thus, he cannot be heard to complain that he involuntarily became a limited-purpose public figure.

Indeed, in opposing the newspaper defendants' motion for summary judgment in the court below, plaintiffs acknowledged that in order to survive the motion, they had to establish an issue of fact with respect to whether the newspaper defendants published the statement that plaintiff Samuel Naro was a "suspect" in the Szeker murder investigation with knowledge that he was not a suspect, or in reckless disregard as to whether or not he was a suspect, *i.e.* actual malice. (Pa104). They concede it again in their appeal brief. (Pb22). To determine whether a genuine issue of material fact exists as to actual malice, the Court must decide whether plaintiffs have produced "clear and convincing evidence" of actual malice by a sufficient "quantum and quality of proof." *Costello v. Ocean City Observer,* 136 N.J. at 614. Plaintiffs "must produce substantial evidence to survive a motion for summary judgment." *Id.* at 615.

In order to meet the "actual malice" test, "a public figure must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false." *Lawrence v. Bauer Publishing & Printing Ltd.,* 89 N.J. 451, 466, *cert. denied,* 459 U.S. 999 (1982), *applying New York Times v. Sullivan,* 376 U.S. at 279-80. Libel defendants have not acted with "reckless disregard" under the *Sullivan* rule unless they have published defamatory statements with "a high degree of awareness of their probable falsity." *Garrison v. Louisiana,* 379 U.S. 64, 74 (1974), *quoted in Lawrence v. Bauer,* 89 N.J. at 466. As Justice Clifford paraphrased the "actual malice" standard in *Lawrence v. Bauer:* the defendant's "reckless-

ness in publishing material of obviously doubtful veracity must approach the level of publishing a 'knowing, calculated falsehood.' " *Lawrence v. Bauer,* 89 N.J. at 466; *see also Ryan v. Brooks,* 634 F.2d 726, 733 (4th Cir. 1980).

The New Jersey Supreme Court has ruled that only subjective evidence will satisfy plaintiffs' actual malice burden:

> The actual-malice standard is subjective. . . . Accordingly, the inquiry concerns [the defendant's] state of mind. To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that the defendant had a subjective awareness of the story's probable falsity.

Costello, 136 N.J. at 615; *accord Lawrence v. Bauer,* 89 N.J. at 467-68. Plaintiffs have presented no evidence that the newspaper defendants knew Naro was not a suspect or entertained serious doubts about whether he was a suspect.

In *Lawrence v. Bauer,* the plaintiffs challenged a newspaper article about alleged improprieties in obtaining signatures for a petition to oppose construction of a new firehouse in Rahway. *Id.* at 455. A source in the city administration had said that the city prosecutor was investigating the possibility of forgery in the petition. The defendants assumed that the plaintiffs, Lawrence and Simpson, would be investigated because they were responsible for witnessing some petition signatures. *Id.* at 455-56, 467. The article was entitled, in part, "City Attorney rules association petitions improper; forgery charges may loom for Simpson." *Id.* at 456. The article erroneously stated that the city prosecutor had been asked to take action against Lawrence and Simpson, and that a case would be based on forgery and false swearing of oaths and affidavits. *Id.* The New Jersey Supreme Court described the assumption that Lawrence was being investigated as a "misconception," and characterized the article as

a "careless and perhaps irresponsible account" of the information the newspaper had received from an informant in the city administration. *Id.* at 468. Nevertheless, the Court ruled that the evidence was insufficient to show that the defendants had known that the article was false or that they had actually doubted its accuracy. *Id.*

In the more recent case of *Costello v. Ocean City Observer,* the New Jersey Supreme Court affirmed the grant of summary judgment in favor of newspaper defendants charged with defamation. In *Costello,* a reporter had written an article based on an unsigned, unfiled draft of a complaint that was attached to an affidavit filed with the court. 136 N.J. at 618-19. In the unsigned, unfiled draft complaint, plaintiff Costello, a police officer, was charged with conducting an unlawful strip search of a handcuffed woman in custody. Notwithstanding evidence that other documents in the reporter's possession demonstrated the falsity of the information reported and that the reporter had failed to conduct a thorough investigation, the Supreme Court refused to overturn summary judgment entered in favor of the reporter and his newspaper. *Id.* As the Supreme Court stated: "Although Costello urges that a fuller investigation was required, failing to investigate more fully 'merely establishes possible negligence — it does not establish subjective knowledge of falsity or serious doubt about the truth of the story.'" *Id.* at 619 (quoting R. Smolla, Law of Defamation § 3.17, at 3-40.2). The Supreme Court further declared: "Costello fails to point to any proof suggesting that [the reporter] actually doubted that [the woman's] claim was true or doubted that the complaint was pending." *Id.* "A plaintiff must demonstrate more than an erroneous interpretation of the facts to demonstrate actual malice." *Id.* Notwithstanding its finding that there was "shoddy and careless reporting," the New Jersey Supreme Court decided that the plaintiffs had not produced "clear and convincing" evidence of

actual malice and remanded the case for entry of an order granting summary judgment for defendants. *Id.* at 619-20.

Plaintiffs' purported evidence of actual malice here is far weaker than that offered in *Lawrence* or *Costello.* In both *Lawrence* and *Costello,* it was undisputed that the statements made were false. Here, the statement that Naro was a suspect was true. In both *Lawrence* and *Costello,* there was contradictory evidence that the newspapers failed to consider. Here, there is significant evidence that Naro should have been a suspect given his use of disguises in the October 23, 1990 robbery, his ownership of a van that initially appeared to be similar to the van used in the Szeker murder, and Naro's admitted resemblance to the composite of the murder suspect.

The arguments raised by plaintiffs fail to address any material issues in this case. Plaintiffs argue that Naro was a taxpayer with a good reputation as a firefighter and family man and presumably, therefore, defendants should not have believed Naro could have been a suspect in a murder case. (Pb16). Defendants, however, were told he was a suspect and the reasons why: the circumstances of his arrest for armed robbery just one day earlier, his resemblance to the composite of the Szeker killer[4] and his ownership of a van.

Plaintiffs claim that Naro did not really resemble the Szeker killer and that the van used in the murder was different than Naro's van. (Pb10 to 11). The police and Naro's coworkers, however, believed there was a similarity between Naro and the composite and (at least initially) between the van used in the murder and Naro's van. In any event,

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[4] Plaintiffs claim that it was material that Naro did not resemble the killer's composite, but instead that of the getaway driver. (Pb3, 9 to 10). Under New Jersey law, a getaway driver—as an accomplice—is as culpable as the person who pulls the trigger. N.J.S.A. 2C:11-3(3).

newspapers are not required nor expected to report with scientific precision. The New Jersey Supreme Court has "recognize[d] that newspapers face competitive pressures to investigate stories quickly." *Costello,* 136 N.J. at 619-20.

Plaintiffs complain that it was not clear that Naro was just one of many suspects. Yet, *The Times'* article identifying Naro as a suspect quoted the police as stating that Naro "does fit the composite, but there are so many people that fit the composite that it doesn't mean a lot"; and that "the investigation of Naro was not a break in the case but just a lead that has to be checked." (DTa66).

None of these issues has any bearing on whether the newspaper defendants acted with actual malice in publishing the statement that Naro was a suspect in the Szeker murder. He was a suspect. Plaintiffs have presented no evidence to the contrary.

With the uncontroverted statements of Hamilton Township Police Chief Taylor and Detective Captain Pizzullo that Mr. Naro was a suspect in the Szeker murder, and that this official position of the police department was communicated to *The Times,* no reasonable juror could conclude that *The Times* published the statement that Naro was a suspect with knowledge that it was false or in reckless disregard as to whether or not it was false. (DTa127 to 129; DTa132). The facts which provided the basis for the statement — the robbery with use of disguises and deadly weapons, Naro's likeness to the composite sketch of the Szeker killer and his ownership of a van — simply provided the rationale for Hamilton Township's position that Naro was a suspect in the Szeker murder.

Naro's argument boils down to an assertion that although he was a suspect, he should not have been. Given the facts surrounding his earlier assault, there was considerable support for Naro's status as a suspect. However, whether or

not he should have been a suspect does not alter the undisputed fact that he was a suspect.

The record is bereft of clear and convincing (or any) evidence that the newspaper defendants believed that the allegedly defamatory statement reported in the article was false. Nor is there a shred of proof that the newspaper defendants subjectively "entertained serious doubts as to the truth" of the information published about Naro. On the contrary, the article was derived from information communicated by police officials, officials with whom *The Times'* reporter typically had day-to-day contact in the regular course of covering local activities in Hamilton Township.

Even if Naro is not considered a limited-purpose public figure, he still has the burden of proving that the newspaper defendants were at least negligent. *Gertz*, 418 U.S. at 347.[5] Here, *The Times*, in calling Naro a "suspect," relied on the police who were conducting the investigation. Only the police could have known that information. They have confirmed that the information published by *The Times* was accurate. Thus, Naro cannot establish that the newspaper defendants were negligent.

Accordingly, the newspaper defendants have no liability to plaintiffs and summary judgment for the newspaper defendants should be affirmed.

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[5] The United States Constitution prohibits a state from imposing defamation liability without a showing of fault under *Gertz*. 418 U.S. at 347.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2
CIVIL ACTION

SAMUEL NARO and LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VII, RON ROE IX and RON ROE X

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO.: L-91-4718

SAT BELOW

The Hon. Phillip Lewis Paley, J.S.C.
The Hon. David J. Schroth, J.S.C.

BRIEF FOR PLAINTIFFS/APPELLANTS

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STATEMENT OF FACTS

This is an action brought by the Plaintiffs, Samuel Naro and Linda Naro, against the Defendants, Hamilton Township, Hamilton Township Police Department, Detective Captain Thomas Pizzullo, John Does I - X meant to represent other police officers involved in the investigation, The Times, The Newhouse Publishing Company, Peter Page, Richard Bilotti, The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle, H.L. Schwartz, III and Ron Roes I - X meant to represent other employees of the Defendant newspapers whose identities are presently unknown. The specific facts of this case are as follows:

The Plaintiff, Samuel Naro, was and is, a fire fighter in the City of Trenton. Following a two year stint in the Army in the years 1966 to 1968, Mr. Naro was hired as a fire fighter for the City of Trenton in 1970. He was an excellent employee with an excellent work record, prior to an unfortunate incident which occurred on October 23, 1990. At that time, Mr. Naro was arrested on an unrelated assault charge, and it was a highly publicized matter. His arrest created headlines in the daily newspapers of both The Trentonian (114a) and The Times (116a).

These unrelated charges ultimately resulted in a dismissal by virtue of a judgment of acquittal following a non jury trial on March 12, 1993. That dismissal, decided by The Honorable Maria Marinari Sypek, J.S.C., is annexed as (118a).

The background information concerning the arrest of Mr. Naro on assault charges, and his subsequent acquittal, are being brought to the Court's attention merely for background information in this matter. The Defendants, and all of them, have attempted to paint a picture of Mr. Naro as some sort of career criminal, by bringing up this arrest, and it is significant that he was acquitted of these charges. Mr. Naro, without his consent, was thrust onto the front pages of the Defendant newspapers as a result of his arrest, although he was subsequently acquitted. This attempt by the Defendant newspapers to create a public figure in Mr. Naro was the impetus for the alleged justification of Defendants to publish the libelous articles which form the basis of this Complaint.

What happened subsequently can best be described as a nightmare for Mr. Naro. Apparently, the Hamilton Township Police were investigating the highly publicized September, 1989 murder of a Marjorie Szeker, who was a teacher at the Hun School in Princeton Township, murdered on September 20, 1989 at the Cost Cutters store in Hamilton Township. The police had a composite sketch of the alleged murderer, and in fact had a suspect who was a prisoner at the Mercer County Detention Center named Louis Angel Rivera. In fact, The Trentonian ran an article on July 11, 1991, which is attached as (120a), indicating that Mr. Rivera had confessed to the Szeker murder, * * *